(26,645)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 559.

F. S. ROYSTER GUANO COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

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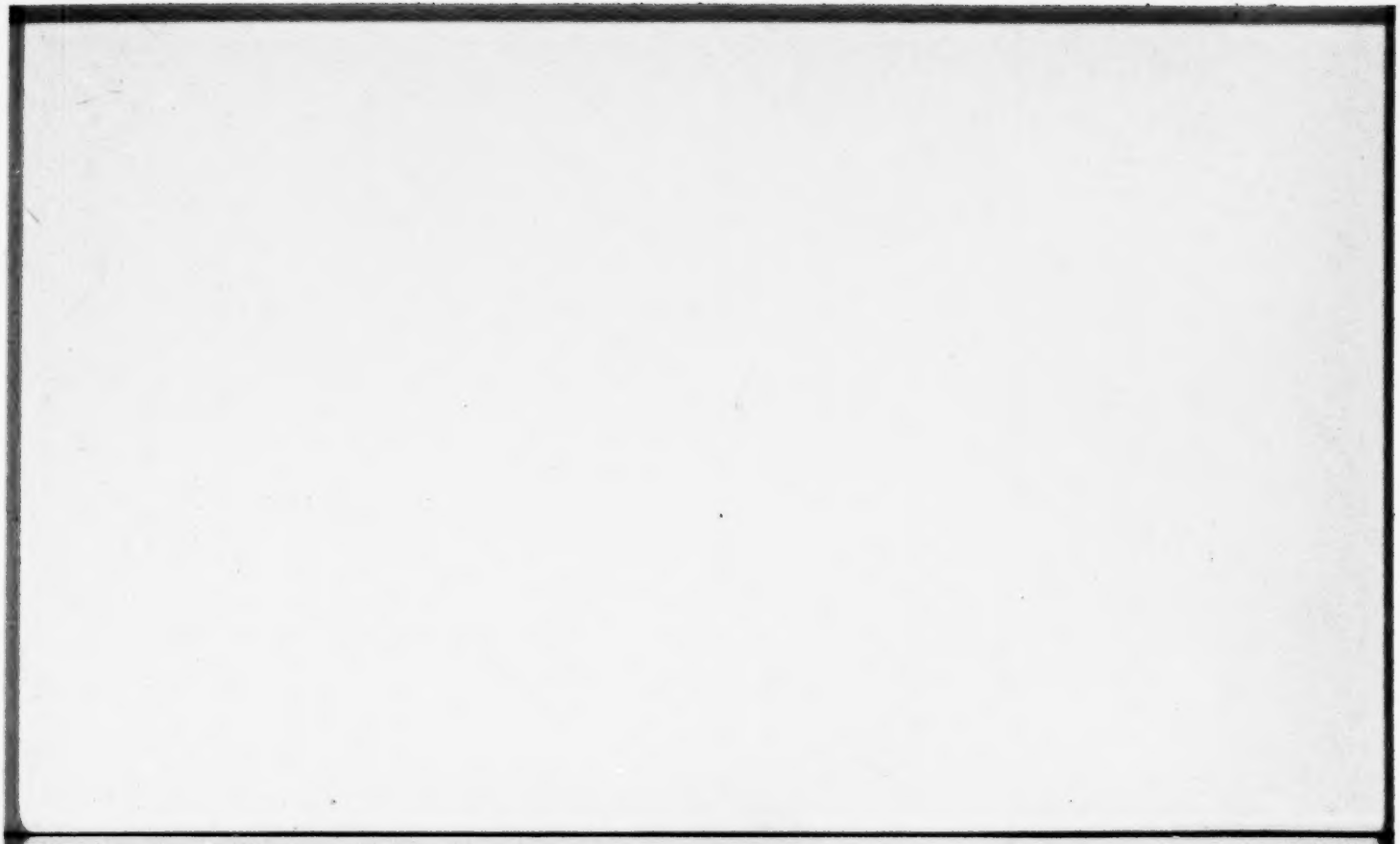

1 *Writ Granted.*

COMMONWEALTH OF VIRGINIA:

Supreme Court of Appeals.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

Petition for a Writ of Error.

And now comes the F. S. Royster Guano Company, the above named petitioner, and says that on the 13th day of June, 1918, the Supreme Court of Appeals, within and for the Commonwealth of Virginia, upon the exercise by it of jurisdiction to review this case upon the merits declined to allow a writ of error to the lower State Court, and entered final judgment herein in favor of the above named respondent, and against the above named petitioner, in which judgment and proceedings had prior thereto in this suit, certain errors were committed, to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the F. S. Royster Guano Company, the said petitioner, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so com-
2 plained of may be corrected, and the said judgment reversed, and that a transcript of the record, proceedings and papers in this suit, duly authenticated, may be sent to the Supreme Court of the United States.

F. S. ROYSTER GUANO COMPANY,
By C. F. BURROUGHS, *Vice-President.*

CADWALLADER J. COLLINS,
Solicitor and Counsel for Petitioner and Plaintiff-in-Error.

Writ of Error and Supersedeas allowed upon the execution of a bond by the above named petitioner, as principal, and F. S. Royster and C. F. Burroughs, as sureties, in the sum of Five Thousand Dollars.

STAFFORD G. WHITTLE,
President of the Supreme Court of Appeals of Virginia.

3 [Endorsed:] Commonwealth of Virginia, Supreme Court of Appeals. F. S. Royster Guano Company, Petitioner, v. Commonwealth of Virginia, Respondent. Petition for a Writ of Error. Law Offices of Cadwallader J. Collins, Law Building, Norfolk, Virginia.

4 COMMONWEALTH OF VIRGINIA:

Supreme Court of Appeals.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

Assignment of Errors.

And now comes the F. S. Royster Guano Company, the above named petitioner and plaintiff-in-error, and with its petition for a writ of error makes and files the following assignments of error, and says there is manifest error in that the Supreme Court of Appeals of Virginia erred in the particulars herein set forth.

I. In holding that the "Equal protection of the laws" clause of the Fourteenth Amendment of the Federal Constitution is not violated in that under Chapter 472 of the laws of 1916 of Virginia, Domestic Corporations having a plant, or plants, located in Virginia, and a plant, or plants, located beyond the limits of Virginia are taxed by a different and much more onerous rule than is used in taxing Domestic Corporations with a plant, or plants, located beyond
5 the limits of Virginia and without a plant located in Virginia, it being provided by Chapter 495 of the laws of 1916 of Virginia that Domestic Corporations that do no part of their business in Virginia but transact business beyond the limits of Virginia are exempt from a tax on profits from earnings derived from plants beyond the limits of Virginia.

II. In refusing to rule that Chapter 472 of the laws of 1916 of the Commonwealth of Virginia, as applied to domestic corporations, including the petitioner, which have plants located in Virginia, and plants located wholly outside of Virginia, is unconstitutional and void under the Federal Constitution, because subjecting their property situated outside of Virginia to taxation, and in undertaking to compel the payment of an income tax of a given per cent. on profits from earnings of plants located beyond the limits of Virginia, and in thus depriving them of their property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

IV. In refusing to rule that Chapter 472 of the laws of 1916 of the Commonwealth of Virginia as applied to Domestic Corporations, including the petitioner, having a plant, or plants, located in Virginia and beyond the limits of Virginia, is unconstitutional, and

therefore null and void, because said Chapter 472 requires payment by said Domestic Corporations, including petitioner, of an income tax of a given per cent. on profits from earnings of plants located in Virginia, and on profits from earnings of plants located beyond the limits of Virginia, and doing business outside of Virginia,
6 and thereby imposes a burden on the interstate business of such corporations, and subjects their property and business outside of the Commonwealth of Virginia to taxation, thus constituting an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Section 8 of Article 1 of the Constitution of the United States.

V. Because the Court erred in dismissing complainant's petition.

F. S. ROYSTER GUANO COMPANY,
By CADWALLADER J. COLLINS,
Its Solicitor and Counsel.

7 [Endorsed:] Commonwealth of Virginia, Supreme Court of Appeals. F. S. Royster Guano Company, Petitioner, v. Commonwealth of Virginia, Respondent. Assignment of Errors. Law Offices of Cadwallader J. Collins, Law Building, Norfolk, Virginia.

8 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Appeals of the State of Virginia, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between F. F. Royster Guano Company and Commonwealth of Virginia, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said F. F. Royster Guano Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washingon on the — day of July, 1918, in the said Supreme Court, to be then and there
9 held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the said Supreme Court, the 22nd day of June, in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

Allowed by
STAFFORD G. WHITTLE,
President Supreme Court of Appeals of Virginia.

10 (Copy.)

Bond.

COMMONWEALTH OF VIRGINIA:

Supreme Court of Appeals, Richmond, Virginia.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

Bond on Writ of Error.

Know All Men by These Presents: That we, the F. S. Royster Guano Company, a corporation under the laws of Virginia, the above named petitioner and plaintiff-in-error, as Principal, and F. S. Royster and C. F. Burroughs, of Norfolk, Virginia, as Sureties, are held and firmly bound unto the Commonwealth of Virginia, the above named respondent and defendant-in-error, in the full and just sum of Five Thousand Dollars ($5,000.00) to be paid to the said Commonwealth of Virginia; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators and successors and assigns, jointly and severally, by these presents.

11 Sealed with our seals, and dated the — day of June, in the year of our Lord, one thousand nine hundred and eighteen.

Whereas lately in the Supreme Court of Appeals of Virginia sitting within and for the Commonwealth of Virginia in the above case depending in said Court between the said F. S. Royster Guano Company, Petitioner, and the Commonwealth of Virginia, Respondent, final judgment was rendered against the said F. S. Royster Guano Company, Petitioner, and in favor of the said Commonwealth of Virginia, Respondent, and the said F. S. Royster Guano Company, having procured a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgment in the aforesaid case, and a citation directed to the said Commonwealth of Virginia citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington thirty days after the date of such citation.

Now the condition of the above obligation is such, that if the said F. S. Royster Guano Company shall prosecute its said writ of error to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

12

F. S. ROYSTER GUANO COMPANY,
By C. F. BURROUGHS, *Vice-President.*

Attest:

[Seal F. S. Royster Guano Co., Incorporated 1900, Norfolk, Va.]

C. S. CARR, *Secretary.*

F. S. ROYSTER. [SEAL.]
C. F. BURROUGHS. [SEAL.]

June 26, 1918. Approved.
STAFFORD G. WHITTLE,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Original. Bond received & filed June 26, 1918. H. Stewart Jones, Clerk.

13 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of Appeals of Virginia wherein F. S. Royster Guano Company, a corporation under the laws of the State of Virginia, the original

petitioner, is the plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stafford G. Whittle, President of the Supreme Court of Appeals of Virginia, this 29th day of June, in the year of our Lord one thousand nine hundred and eighteen.

STAFFORD G. WHITTLE,
President of the Supreme Court of Appeals of Virginia.

Service accepted for the Commonwealth of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

J. D. HAUP, JR.,
Asst. Attorney General.

14 [Endorsed:] Citation on Writ of Error. Law Offices of Cadwallader J. Collins, Law Building, Norfolk, Virginia.

15 In the Supreme Court of Appeals of Virginia, at Richmond.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, F. S. Royster Guano Company, a corporation created by and existing under the laws of Virginia, respectfully represents that it is aggrieved by a judgment of the Corporation Court of the city of Norfolk, Virginia, entered on the 2nd day of April, 1918, in a certain proceeding depending in said Court wherein your above named petitioner was plaintiff and the Commonwealth of Virginia was defendant.

A transcript of the record is herewith filed. The case presents the question of interpretation and of the constitutional validity
16 of the assessment of an income tax of one per cent. made pursuant to Chapter 472 of the laws of 1916 on profits from earnings of plants of the F. S. Royster Guano Company located beyond the limits of Virginia and doing business outside of Virginia, and was heard upon the petition and an agreed statement of facts, filed as part of the record, which shows:

(1) That the F. S. Royster Guano Company, a Virginia corporation, is engaged in interstate commerce consisting of the manufacture of commercial fertilizers made in certain States of the United States for sale in other States and in foreign countries, and of the transportation and delivery of its products and merchandise to consumers

or buyers thereof, residing or located in States other than those where such fertilizers are manufactured.

(2) That it has a plant for the manufacture of commercial fertilizers located in the county of Norfolk, and State of Virginia, and the business conducted by it at this plant consists of intra-State and interstate commerce, its intra-State shipments from said plant being of a trifling amount compared with the total shipments, nevertheless under and pursuant to Chapter 472 of the laws of 1916 of the State of Virginia it returned for taxation as income for the year
17 1917 all profits derived from fertilizers manufactured at said plant, and shipped to points in and out of the State of Virginia within the twelve months from January 1st to December 31st, 1916, the amount of said return being $260,684.00.

(3) That by far the larger part of the capital, property and assets of the F. S. Royster Guano Company are permanently invested and located beyond the limits of the State of Virginia, and by far the larger part of its capital, property and assets are used and employed in interstate commerce beyond the limits of said State and in no way concern the domestic or interstate portion of its business manufactured at and shipped from its Norfolk plant, its plants beyond the limits of Virginia being located as follows:

A plant for the manufacture of commercial fertilizers located at Curtis Bay, Anne Arundel County, Maryland, from which it ships fertilizers to points in Maryland and states north and west thereof; a plant at Tarboro, North Carolina, and a plant at Charlotte, North Carolina and states west and south thereof; a plant at Columbia, South Carolina, and a plant at Spartanburg, South Carolina, and states west and south thereof; a plant at Macon, Georgia,
17½ from which it ships fertilizers to points in Georgia and states west and south thereof, and a plant in Montgomery, Alabama, from which it ships fertilizers to points in Alabama and states west and south thereof.

In addition to its plants located beyond the limits of Virginia the F. S. Royster Guano Company maintains selling agencies in the several states in which these plants are located and commercial fertilizers manufactured at said plants are sold through these agencies for delivery in and throughout the several states of the United States, and the goods so produced and sold are loaded at the various factories beyond the limits of Virginia, billed by the railroad to the purchaser as consignee, and delivered to the purchaser at his place of business in whatever state he is located.

(4) That under and pursuant to Chapter 472 of the laws of 1916 of the Commonwealth of Virginia, the Examiner of Records has reported to the Commissioner of the Revenue an additional sum of $270,759.00 as income taxable by the State of Virginia, and the Commissioner of the Revenue has added to the $260,684.00 returned by the F. S. Royster Guano Company as aforesaid, said sum of $270,759.00 and assessed thereon an income tax of one
18 per cent., that is to say, the sum of $2,707.59, said $270,759.00 being profits from earnings of said plants located be-

yond the limits of Virginia and doing business outside of Virginia as aforesaid.

Errors Alleged.

Your Petitioner respectfully submits that the judgment of the Court sustaining the assessment of an income tax of one per cent. on the sum of $270,759.00, which said sum represents profits from earnings of its plants located beyond the limits of Virginia and doing business outside of Virginia, is erroneous in the following respects:

First Assignment of Error.

The Act lays the same income tax upon foreign and domestic corporations and as the tax upon foreign corporations is, by force of the Federal Constitution, limited to the business done by them within the State, it cannot be presumed that the legislature intended to unjustly discriminate against domestic corporations by taxing the business done by them outside of the State.

19 Section 10 of the Act under which this assessment was made (Chapter 472 of the Acts of 1916) reads as follows:

"The classification under Schedule D providing for the taxation of income shall be as follows, to-wit:

The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding the first of January in each year, subject to the deductions and exemptions herein below recited."

It thus appears the Act provides that an income tax shall be levied on the aggregate amount of income of each person or corporation and it therefore includes foreign corporations. Consistently with the due process clause of the Fourteenth Amendment a State can not tax property located or existing permanently beyond its limits and as the Legislature could not lay a tax upon the income of foreign corporations derived from plants located beyond the limits of Virginia, it is submitted that the Legislature could not have intended to discriminate against domestic corporations by laying a tax upon their incomes derived from plants located beyond the limits of Virginia, but on the contrary, intended to confine and limit the tax to the income of foreign and domestic corporations derived from plants located within the limits of Virginia.

20 In State v. United States Fidelity and Guaranty Company of Baltimore City (Maryland), 48 Atl., 918, the Act provided for a franchise tax of two per cent. on the gross receipts of every guaranty and fidelity company incorporated under the laws of the State and doing business therein, and that the provisions of the Act should apply to all corporations of a like kind doing business in the State though incorporated under the laws of another State. It was held that the tax imposed was limited to the gross receipts on the business of domestic guaranty and fidelity companies within

the State and did not include their interstate business. In construing the statute, the Court said:

"The obvious answer, then, to the appellant's contention is that the Legislature could not have intended by the Act now before us to lay a tax upon the business of the company done by it without the State, but its object and purpose was to confine and limit the tax to its business done within the State. This construction of the statute, we think, is strengthened by a reference to that part of the statute which provides that the provisions of the Act shall apply to all corporations of a like kind to those enumerated by the Act which are doing business in this State, and which are incorporated by or under the laws of other States. It is, then, quite clear that the tax required by the statute to be paid by foreign corporations is
21 limited to the business done by them within the State, and it cannot be presumed that the Legislature intended to unjustly discriminate against domestic corporations doing business in this State by taxing the business done by them outside of the State."

That the Legislature could not have intended by Chapter 472 of the laws of 1916 to lay an income tax on profits from earnings of domestic corporations derived from plants located beyond the limits of Virginia and doing business outside of Virginia, is strengthened by applying the rule that in the interpretation of statutes, acts in pari materia are to be read and construed together. This rule of construction is especially applicable in the case of revenue laws and it is submitted that Chapter 472 of the Acts of 1916, must be read and construed together with Chapter 381 of the Acts of 1916, which provides, among other things (See p. 658) that

"Where any person, firm or corporation domiciled and doing business in this State maintains a branch of such business outside of the State, no part of the capital of such person, firm or corporation permanently invested in any such branch of its business, nor any intangible assets, arising from business originating at such branch and transacted outside of this State, shall be considered as situated in this State for the purpose of taxation
22 or be assessed with taxes in this State—any statutory provision or rule of construction to the contrary notwithstanding—it being the intent and purpose of this provision to exact of citizens of this State no higher or greater tax than that exacted of non-residents doing business in this State."

Mr. Black, in his book on income taxes, in speaking of the rule of construction by the aid of statutes in pari materia, says:

"The reasons for this rule have been explained by the present writer in another volume, as follows:

'All the enactments of the same legislature on the same general subject matter are to be regarded as parts of one uniform system. Later statutes are considered as supplementary or complementary to the earlier enactments. In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaptation of the original design to apply it to changing conditions or circumstances. In the passage of each act,

the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject and to have shaped its new enactment with reference thereto. Hence the same principle which requires us to study the context for the meaning of a particular phrase or provision, and which directs us to compare all the several parts of the same statute, only takes
23 a broader scope when it bids us read together, and with reference to each other, all statutes in pari materia. Whatever is ambiguous or obscure in a given statute will be best explained by a consideration of analogous provisions in other acts relating to the same subject, or by a study of the general policy which pervades the whole system of legislation. Secondly, the rule derives support from the principle which requires that the interpretation of a statute shall be such, if possible, as to avoid any repugnancy or inconsistency between enactments of the same legislature.' "

Black on Income Taxes, 2nd Ed., Sec. 218.

If it be true that "in the course of the entire legislative dealings with the subject we are to discover the progressive development of a uniform and consistent design," then it will be a legitimate method of construing the income tax law of 1916 (Chapter 472) to compare it with the corresponding provisions on the same point in the Act passed by the Legislature of 1918, from which it appears that as the law now stands

"Persons and corporations doing a part of their business within the State and a part without the State, and having offices or other regular places of business both within and without the State, shall be taxed only upon such income as is derived from business transacted and properly located within the State."

Acts of 1918, Senate Bill No. 167.

24 As the law now stands, the legislature has re-iterated its previously expressed public policy of exacting of citizens of this State no higher or greater tax than that exacted of non-residents doing business in the State.

Second Assignment of Error.

The tax is arbitrary and a denial of equal protection of the laws under the Fourteenth Amendment of the Federal Constitution.

Under Chapter 472 of the laws of 1916, domestic corporations having a plant, or plants, located in Virginia, and beyond the limits of Virginia, are required to pay an income tax of one per cent. on profits from earnings of plants located in Virgina and on profits from earnings of plants located beyond the limits of Virginia and doing business outside of Virginia, whereas under Chapter 495 of the laws of 1916, domestic corporations that do no part of their business in Virginia but transact business beyond the limits of Virginia, are exempted from a tax on profits from earnings derived from plants beyond the limits of Virginia.

A classification for taxation that requires payment by a domestic corporation with plants in Virginia and other states of a
25 tax of a given per cent. on all profits from earnings everywhere, but exempts domestic corporations of the same kind with plants in other states carrying on a precisely similar business, from a tax on profits from earnings is arbitrary and a denial of equal protection of the laws under the Fourteenth Amendment of the Federal Constitution.

In Cotting v. Kansas City Stock Yards Co., 183 U. S., 79, the State of Kansas passed an Act regulating all charges of stock yards, general in its terms and yet so phrased as necessary to discriminate between stock yards doing a large and those doing a small business. The court held that by this Act, the Kansas City Stock Yards was denied the equal protection of the laws.

In Connolly v. Union Sewer Pipe Co., 184 U. S., 540, the State of Illinois passed an Act defining trusts and conspiracies against trade, it being provided therein that the provisions of the Act should not apply to agricultural products or live stock while in the hands of the producer, or raiser, and this distinction was held to be arbitrary and a denial of equal protection of the laws.

In Raymond v. Chicago, 207 U. S., 20, the Board of Equalization assessed the franchises and other property of certain
26 companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class. It was held this was a denial of equal protection of the laws.

In Southern Railway Co. v. Greene, 216 U. S., 400, the State of Alabama levied a privilege tax upon the Southern Railway, a foreign corporation, but did not impose the same tax upon domestic corporations doing precisely the same business; the court held that by this tax the railroad company was denied the equal protection of the laws, no like tax being levied upon domestic corporations.

We submit that the law under review has no reasonable basis resting on a real distinction but on the contrary, places upon domestic corporations with plants in Virginia, an arbitrary burden so far as their plants located beyond the limits of Virginia and doing business outside of Virginia are concerned, not placed upon domestic corporations that have no plants in Virginia, but have plants beyond the limits of Virginia doing the same kind of business under the same circumstances.

A taxed company may have a plant in Virginia with only a few employees which it operates at a loss; it may also have plants in a dozen other states with thousands of employees and prac-
27 tically all its profits may be from the earnings of plants outside of Virginia. A non-taxed company may have plants in all the states, Virginia excepted, in which the taxed company has plants, and its profits from the earnings of these plants may greatly exceed the profits of the taxed company, yet the non-taxed company escapes taxation upon its profits on earnings simply because it does not have an insignificant plant in Virginia.

Again, a taxed company may have a plant in Virginia with thousands of employees to whom it pays hundreds of thousands of dollars in wages, thus benefitting the Commonwealth, and it may have plants in a dozen other states that compete sharply with the plants of the non-taxed company. By reason of the arbitrary burden of taxation placed upon it by this law, the taxed company is penalized for having a plant in Virginia in an amount equal to the tax which the non-taxed company escapes.

We respectfully submit that as there may be no distinction whatsoever between the plants of the taxed company located beyond the limits of the State of Virginia and those of the non-taxed
28 companies; no difference in the way they do business and its results, and no difference in their relation to the public the statute in question places upon the taxed companies an arbitrary burden not placed upon the non-taxed companies, and therefore denies to the taxed companies the full protection of the laws.

Third Assignment of Error.

A State must measure its taxes by property or business which it protects and not by wealth which has its situs elsewhere.

In a recent article in 31 Harvard Law Review, the author makes the statement that "whenever a state bases the amount of its taxes on values which lie beyond its borders, it is emulating the example of the hard man of the parable in seeking to reap where it sowed not and gather where it has not strawed. Its constitutional right to do this was long ago sanctioned by the declaration of Chief Justice Marshall that the power to tax involves the power to destroy. It has taken Marshall's successors near a hundred years to break the spell of his apothegm." We submit that this has been accom-
29 plished and that the Supreme Court of the United States has, by two recent cases, established the doctrine that the states must measure their taxes by property or business which they protect, and not by wealth which has its situs elsewhere.

In Looney v. Crane Company, decided December 10, 1917, and reported in U. S. Adv. Ops. 1917, p. 144, the Supreme Court declared invalid a Texas statute imposing a franchise tax on both domestic and foreign corporations, which was measured by total capital stock plus surplus and undivided profits.

The Crane Company, a corporation under the laws of Illinois, had acquired real estate at Dallas, Texas, and built a warehouse and also had a warehouse at another place in the State. Its total assets in Texas, consisting of money, merchandise and two warehouses, were assessed at $301,179.00. Its total paid up capital was $17,000,000.00 and its surplus and undivided profits were $8,129,000.00. Its gross receipts for the year 1913 were $39,831,000.00, of which only $1,019,750.00 had any relation to the State of Texas and nearly one half of this amount was the result of transactions purely of an interstate commerce character arising from the sale of shipments of

goods from other states to purchasers in Texas who ordered
30 them, and from the shipments from Texas to other states for the purpose of filling orders sent from such state. The tax imposed by the statute would have required the company to pay, in order to do business in the State, the sum of $17,040.00.

The Chief Justice, speaking for the Court, said:

"It may not be doubted under the case stated, that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intra-state business of such corporation carried on as a result of permission to come in. The sole contention, then, upon which the acts can be sustained, is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the
31 United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established."

Every word of Chief Justice White's opinion above quoted might be applied with equal logic to the tax that the State of Virginia assessed on profits from earnings of domestic corporations derived from plants located beyond the limits of Virginia and doing business outside of Virginia.

In International Paper Co. v. Commonwealth of Massachusetts, decided March 4, 1918, and reported in U. S. Adv. Ops. 1917, p. 319, the Supreme Court declared invalid a Massachusetts statute imposing an excise tax on foreign corporations of 1/100 of 1 per cent. of the par value of the authorized capital stock in excess of $10,000,000.00. The State Court held that this tax was imposed as an annual
32 excise for the privilege of doing a local business within the State.

The court said, among other things, that

"The State cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside of the State."

True, the tax held invalid in the Looney and International Paper Co. cases, was imposed on foreign corporations, but with deference,

we submit the reasoning of the Court applies to the instant case and that the State of Virginia cannot require a domestic corporation as a condition of the right to have a plant in Virginia, to submit to a tax on its interstate business represented by profits from plants located beyond the State of Virginia and doing business outside of Virginia.

Fourth Assignment of Error.

A State tax on receipts from interstate commerce is invalid.

It is a constitutional principle that a state may not impose taxes on interstate commerce or any receipts which arise therefrom.

33 "It must be assumed, in accordance with repeated decisions, that the State cannot lay a tax on interstate commerce in any form, by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it."

Kansas City Ry. v. Kansas, 240 U. S., p. 231.

"When the tax is measured by property or by capital stock, it is not increased by an increase in the volume of interstate commerce. When the tax is measured by receipts, it is increased by an increase in the volume of interstate commerce. The economic result of this increase of taxation dependent upon an increase of interstate commerce is to increase pro tanto the cost to the corporation of conducting interstate commerce. This is exactly the kind of burden which the states are forbidden to impose directly and which the Western Union case (216 U. S., 1) forbids them to impose by indirection."

31 Harvard Law Review at p. 765.

The United States Supreme Court has itself called attention to the practical distinction between taxes measured by property or capital stock and those measured by receipts.

"The tax, as will be observed, is not in any wise based upon receipts of the company from interstate commerce, either taken alone or in connection with the receipts from its intra-state

34 business. Since, therefore, the amount of imposition is not made to fluctuate with the volume of the business done, we are relieved from those difficulties that arise where state taxes are based upon the earnings of interstate carriers."

St. Louis &c. Ry. v. Arkansas, 235 U. S., 350, 363, 364.

It thus appears that the states cannot impose taxes on receipts derived from interstate commerce and a tax on profits from earnings of plants located beyond the limits of the state and doing business outside of the State is certainly an effort to tap profits attributable to commercial transactions conducted in other states.

In Philadelphia and Southern Steamship Company v. Pennsylvania, 122 U. S. 326, the State of Pennsylvania sought to impose a state tax on the gross receipts of a domestic steamship company, duly

incorporated under its laws, and this tax was held to be invalid as a regulation of interstate commerce. The Court said, at p. 342:

"If such a tax is laid and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it."

35 In Galveston, Harrisburg &c. Ry. Co. v. Texas, 210 U. S. 217, the State of Texas sought to impose a state tax equal to one per cent. of the gross receipts of a domestic railroad company. The lines of the railroad were wholly within the State but they connected with other lines and a part of the gross receipts were derived from the carrier of passengers and freight coming from, or destined to, points without the State. The statute imposed a tax "equal to one per cent. of its gross receipts if such line of railroad lies wholly within the State" but the Court said this was "merely an effort to reach gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words 'equal to.'" The tax was held to be a burden on receipts derived from interstate commerce and as such violative of the commerce clause of the Federal Constitution.

In these cases the tax is measured by receipts derived from the transportation of freight and passengers but it is now settled that

"The immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies."

36 International Paper Co. v. Massachusetts, U. S. Adv. Ops. 1917, p. 321.

In Chew Levick Company v. Commonwealth of Pennsylvania, decided by the Supreme Court of the United States December 10, 1917, and reported in U. S. Adv. Ops. 1917, p. 122, the plaintiff sold and delivered at wholesale, from a warehouse located in Pennsylvania, merchandise to the value of about $47,000.00 to purchasers within the State, and merchandise to the value of about $430,000.00 to customers in foreign countries, the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in its office in the State of Pennsylvania subject to its approval, while in some cases orders were sent direct by customers in foreign countries to plaintiff; and the goods thus ordered upon the acceptance of the orders, were shipped direct by plaintiff from its warehouse in Pennsylvania to its customers in the foreign countries. Under the Act a merchant's license tax was imposed upon plaintiff based upon the amount of its gross annual receipts. The Court said:

"The bare question, then, is whether a State tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to

37 foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. * * *

"We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3.00 imposed upon wholesale vendors doing business within the State in both internal and foreign commerce; but the additional imposition of a per centage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this Court that it is necessary to do little more than refer to a few of the most pertinent."

Numerous cases are cited and the Court goes on to say:

"Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned."

As stated in the petition, intra-state shipments of fertilizers from the F. S. Royster Guano Company's plant in Norfolk County, Virginia, are of trifling amount compared with its inter-state shipments from this plant, nevertheless it has returned for taxa-

38 tion as income for the year 1917, all profits derived from fertilizers manufactured at said plant and shipped to points in and out of the State of Virginia. We respectfully submit that under the doctrine of the Chew Levick Company v. Commonwealth of Pennsylvania, the company could not have been compelled to pay a tax on profits derived from fertilizers manufactured at its Norfolk plant and shipped to points out of the State of Virginia, and a fortiori it can not be compelled to pay a tax on profits from earnings of its plants located beyond the limits of Virginia and doing business outside of Virginia.

For the errors above assigned, and each of them, and for other reasons apparent upon the face of the record in this case, your petitioner prays for a writ of error and supersedeas; that the said judgment may be reviewed and reversed by this Honorable Court; and that such judgment and appropriate order may be made by this Honorable Court as the facts shown by the accompanying record, and the nature of the case may justify.

Respectfully,

F. S. ROYSTER GUANO COMPANY,
By CADWALLADER J. COLLINS, *Counsel.*

CADWALLADER J. COLLINS,
Counsel for Petitioner.

39 I, James E. Heath, an Attorney and counsel of the Supreme Court of Appeals of Virginia, do hereby certify that in

my opinion it is proper that the decision of the above entitled case be reviewed and reversed by this Honorable Court.

JAMES E. HEATH.

Norfolk, Va., April 20, 1918.

Received April 24, 1918.

Refused.
R. R. P.
J. L. K.
S. G. W.
M. P. B.
F. W. S.

Received June 6, 1918.
H. S. J.

40 In the Supreme Court of Appeals of Virginia, at Richmond.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, F. S. Royster Guano Company, a corporation created by and existing under the laws of Virginia, respectfully begs leave to call the Court's attention to the case of Cudahy Packing Co. v. State of Minnesota, decided by the United States Supreme Court on April 15, 1918, and report- in U. S. Adv. Ops. 1917, 1918, p. 456, in order that this case may be considered in connection with its application for a writ of error now pending in the above entitled case.

The Cudahy Packing Company case involves the question of the power of a State to enforce a tax upon a freight line com-
41 pany measured by gross earnings and clearly sets forth the general principles which the Supreme Court considers controlling in cases in which taxes are attempted to be imposed upon earnings derived from interstate commerce. The Court said:

"In so far as the property constituting this car line is regularly or habitually used or employed in Minnesota it is within the taxing power of the State, although chiefly devoted or applied to interstate transportation. * * * This is not questioned; but it is insisted that the tax imposed is not a property tax, but one laid directly on the gross earnings. Of course, if it is laid on the earnings as such, they being derived largely from interstate commerce, it is an unconstitutional restraint or burden on such commerce and void. * * *

"The question of the nature and effect of taxes more or less like this has been repeatedly considered in this Court. In some instances

its solution has been attended with considerable difficulty, for while the controlling general principles have long been well settled, it has not been easy to apply them to all the varying situations presented. A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to Meyer v. Wells, F. & Co. 223 U. S. 298, 56 L. Ed. 445, 32 Sup. Ct. Rep. 218, and United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. Ed. 459, 32 Sup. Ct. Rep. 211, both decided on the same day. The former involved a tax in Oklahoma
42 of a stated per cent. of the gross receipts of an express company doing both a local and an interstate business in that State. The statute called the tax a 'gross revenue tax,' and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax, because, as the statute disclosed, all the property of the company in the State was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent. of the gross earnings of an express company from business done in that State, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the State court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the State as reflected by the gross earnings, and that the amount of the tax did not appear
43 to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as a part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the State."

The instant case involves a tax of a stated per cent. of the receipts of each person or corporation although partly derived from interstate commerce, and cannot be upheld as a property tax, because all of the property of complainant in the State of Virginia is reached and valued as follows:

Its real estate and plant are valued and taxed upon an ad valorem basis in Norfolk County where they are located, and its stock on hand, raw materials for use in business, accounts receivable, bills receivable, machinery and tools not taxed as real estate, money on hand and on deposit, etc., are listed in the Interrogatory for listing by tax payers as "capital," and taxed upon an ad valorem basis in the city of Norfolk where the company's principal office is located.

We submit that the tax is in no way *heoped* by being laid upon the "aggregate amount of income of each person or corpora-
44 tion," because, as stated in Chew Levick Co. v. Commonwealth of Pennsylvania, supra:

"It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the state, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in State Freight Tax Case, 15 Wall. 232, 277, 21 L. Ed. 146, 162; 'The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it.'"

Respectfully submitted,

CADWALLADER J. COLLINS.

Refused:
R. R. P.
F. W. S.

45 VIRGINIA:

In the Supreme Court of Appeals, Held at the Court-house of Wythe County, in the Town of Wytheville, on Thursday, the 13th Day of June, 1918.

The petition of F. S. Royster Guano Company, a corporation, for a writ of error and supersedeas to a judgment pronounced by the Corporation Court of the City of Norfolk, on the 2nd day of April, 1918, in a certain proceeding depending in said Court wherein F. S. Royster Guano Company was plaintiff and Commonwealth of Virginia was defendant, having been heretofore refused by the Judges of this Court in vacation, the petitioner, under the provisions of section 3466 of the Code, tendered again in open Court its petition for said writ of error and supersedeas, and the Court having maturely considered the petition aforesaid, and a transcript of the record of the judgment aforesaid having been seen and inspected, the Court being of opinion that said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the Corporation Court of the City of Norfolk.

A Copy.
Teste:
J. M. KELLY, *C. C.*

46 VIRGINIA:

Pleas Before the Honorable Allan R. Hanckel, Judge of the Corporation Court of the City of Norfolk, Virginia, at the Courthouse of said City, on the 26th Day of November, 1917.

Be it remembered, that this day came the F. S. Royster Guano Company, applicant, by its Attorney, and on motion of said applicant leave is given it to file its written notice of motion and petition against the Commonwealth of Virginia, to correct an assessment and be exonerated from the payment of an income tax for the year 1917, and the same are accordingly filed.

Notice of Motion.

47 To O. L. Shackelford, Esq., Attorney for the Commonwealth for the City of Norfolk, Virginia, and E. J. Doran, Esq., Commissioner of the Revenue of the City of Norfolk, State of Virginia:

You are hereby notified that the following and annexed petition praying for relief of taxes will be filed in the Corporation Court of the city of Norfolk, Virginia, on the 26th day of November, 1917, and at 11 o'clock A. M., of said day, or as soon thereafter as a hearing can be had, the undersigned will apply to said Court for an order exonerating it from the payment of an income tax of one per cent. on the sum of $270,759.00, that is to say, the sum of $2,707.59, which said sum has been reported by the examiner of Records to the Commissioner of the Revenue as additional income taxable by the State of Virginia and has been added by said Commissioner of the Revenue to the $260,684.00 returned by the F. S. Royster Guano Company as income taxable by the Commonwealth of Virginia for the year 1917.

Very respectfully,
F. S. ROYSTER GUANO COMPANY,
By CADWALLADER J. COLLINS,
Its Counsel.

CADWALLADER J. COLLINS,
Attorney for Applicant.

Service accepted.
E. J. DORAN, *C. R.*
O. L. SHACKLEFORD,
Comth. Atty.

48 *Petition.*

COMMONWEALTH OF VIRGINIA:

Corporation Court of the City of Norfolk.

F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

Petition.

To the Honorable the Judge of the Corporation Court of the City of Norfolk, Virginia:

Respectfully represents the F. S. Royster Guano Company, as follows:

(1) That your petitioner is aggrieved by an assessment of taxes made pursuant to Chapter 472 of the laws of 1916, of the Commonwealth of Virginia, and applies for relief to this Court as authorized by Section 567 of the Code of Virginia.

(2) That your petitioner is a corporation duly incorporated and existing under the laws of the State of Virginia, with its
49 principal place of business in the city of Norfolk, in said State, and is engaged in conducting, as its principal function, interstate commerce, consisting of the manufacture of commercial fertilizers made in certain states of the United States for sale in other states and in foreign countries, and of the transportation and delivery of its products and merchandise to consumers or buyers thereof, residing or located in states other than those where such fertilizers are manufactured.

(3) That your petitioner has a plant for the manufacture of commercial fertilizers located in the county of Norfolk, and State of Virginia, and the business conducted by it at this plant consists of intra-state and inter-state commerce, its intra-state shipments from said plant being of trifling amount compared with the total shipments, nevertheless under and pursuant to Chapter 472 of the laws of 1916 of the State of Virginia your petitioner has returned for taxation as income for the year 1917, all profits derived from fertilizers manufactured at said plant, and shipped to points in and out of the State of Virginia within the twelve months from January 1
50 to December 31, 1916, the amount of said return being $260,684.00.

(4) That by far the larger part of the capital, property and assets of your petitioner are permanently invested and located beyond the limits of the State of Virginia and by far the larger part of its capital, property and assets are used and employed in interstate commerce beyond the limits of said State and in no way concern the domestic or interstate portion of its business manufactured at and

shipped from its Norfolk plant, petitioner's plants beyond the limits of Virginia being located as follows:

A plant for the manufacture of commercial fertilizers located at Curtis Bay, Anne Arundel county, Maryland, from which it ships fertilizers to points in Maryland and states north and west thereof; a plant at Tarboro, North Carolina, and a plant at Charlotte, North Carolina, from which it ships fertilizers to points in North Carolina and states west and south thereof; a plant at Columbia, South Carolina, and a plant at Spartanburg, South Carolina, from which it ships fertilizer to points in South Carolina and states west and south thereof; a plant at Macon, Georgia, from which it ships fertilizers to points in Georgia and states west and south thereof; and a plant in Montgomery, Alabama, from which it ships fertili-
51 zers to points in Alabama and states west and south thereof.

In addition to its plants located beyond the limits of Virginia the F. S. Royster Guano Company maintains selling agencies in the several states in which these plants are located and commercial fertilizers manufactured at said plants are sold through these agencies for delivery in and throughout the several states of the United States, and the goods so produced and sold are loaded at the *at the* various factories beyond the limits of Virginia, billed by the railroad to the purchaser as consignee, and delivered to the purchaser at his place of business in whatever state he is located.

(5) That under and pursuant to Chapter 472 of the laws of 1916 of the Commonwealth of Virginia, the Examiner of Records has reported to the Commissioner of the Revenue an additional sum of $270,759.00 as income taxable by the State of Virginia, and the Commissioner of the Revenue has added to the $260,684.00 returned by the F. S. Royster Guano Company as aforesaid, said sum of $270,759.00 and assessed thereon an income tax of one per cent., that is to say, the sum of $2,707.59, said $270,759.00 being profits from earnings of said plants located beyond the limits of
52 Virginia and doing business outside of Virginia as aforesaid.

The aggregate amount of profits from earnings of business done in and out of Virginia upon which an income tax of one per cent. has been assessed by the Commissioner of the Revenue for the year 1917 is $531,443.00, and the total amount of said tax is $5,314.43, and your petitioner avers that in so far as said aggregate amount of $531,443.00 includes profits from earnings of its plants which are beyond the limits of Virginia and doing business outside of Virginia as aforesaid, that is to say in so far as it includes the sum of $270,759.00, it ought not to have been assessed or imposed on your petitioner for the following reasons, namely:

(*a*) Because the Act provides for the payment of a tax by both foreign and domestic corporations in regard to profits from earnings of plants everywhere, without distinction between plants in Virginia and in other states, and as said Act is null and void in so far as it applies to or in any way affects the earnings of foreign corporations derived from plants located outside of Virginia, it cannot be presumed that the legislature intended to discriminate

53 against domestic corporations by taxing their profits derived from plants located outside of said State of Virginia.

(*b*) Because Chapter 382 of the laws of 1916, of Virginia, and said Chapter 472 are parts of one system of revenue laws which must be read and construed together and said Chapter 382 as applied to domestic corporations exempts them from taxation on intangible assets arising from business originating at plants outside of Virginia; and as applied to foreign corporations, especially provides that they shall pay to the State of Virginia a tax corresponding with that exacted of its own citizens and it thus appears that the revenue laws under which said tax on profits from earnings is imposed was not intended to apply or in any way affect your petitioner in regard to that portion of its earnings derived from business originating at plants outside of Virginia.

(*c*) Because in so far as Chapter 472 in any way affects your petitioner in regard to that portion of its business transacted
54 beyond the limits of Virginia it places upon your petitioner a burden not placed upon domestic corporations that do no part of their business in Virginia but transact business beyond the limits of Virginia, said corporations having been expressly exempted by Chapter 495 of the laws of 1916, of Virginia, from a tax on profits from earnings derived from plants beyond the limits of Virginia, and said Chapter 472, as applied to said portion of petitioner's business as is transacted beyond the limits of Virginia, is null and void as being a law depriving your petitioner of its property without due process of law, and denying it the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution.

(*d*) Because Chapter 472 of the laws of 1916 of Virginia as applied to domestic corporations, including your petitioner, in regard to that portion of their business transacted beyond the limits of Virginia, is null and void, in that it requires payment by such corporations of a tax of a given per cent. on all profits from earnings everywhere, including profits from plants that are beyond the limits
55 of Virginia, and thereby imposes a burden on the interstate portion of the commerce and business of such corporations and upon the receipts derived therefrom, thus constituting an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Article 1 of Section 8 of the Constitution of the United States.

(*e*) Because Chapter 472 of the laws of 1916 of Virginia, as applied to domestic corporations, including your petitioner, having real estate and other property situated wholly outside of said Commonwealth, is null and void, on account of subjecting their property beyond the jurisdiction of said Commonwealth, and the receipts derived therefrom, to taxation, and accordingly in depriving them of their property without due process of law, and in denying them the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

(*f*) Because the principal function of your petitioner's business is interstate commerce.

56 Wherefore your petitioner applies for relief to this Court in which the Commissioner of the Revenue gave bond and qualified, as provided by Section 567 of the Code of Virginia, and Acts amendatory thereof or supplementary thereto, and prays that the aforesaid assessment of taxes, amounting to $2,707.59 may be adjudged to have been illegally assessed and imposed, and that your petitioner be exonerated and relieved from the payment of said erroneous and illegal assessment in accordance with the statutes for such cases made and provided.

F. S. ROYSTER GUANO COMPANY,
By CADWALLADER J. COLLINS,
Its Solicitor and Counsel.

57 And afterwards, to-wit: In the Corporation Court of the City of Norfolk, Virginia, at the Courthouse of said City, on the said 26th day of November, 1917, came the applicant, by its attorney, and the Commonwealth of Virginia, by its attorney, and on motion the agreed statement of facts entered into between the said parties by their said attorneys, is herewith filed as a part of the record in this case.

58 *Agreed Statement of Facts.*

It is hereby agreed by and between the parties to this petition that for the purposes of this petition the following facts shall be taken as true and that the Court shall be at liberty to draw inferences of fact from the facts hereinafter stated:

The F. S. Royster Guano Company is a corporation established under the laws of the State of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. Its principal office is in the city of Norfolk, Virginia, and its total authorized capital stock is $2,500,000.00 divided into 10,000 shares of preferred and 15,000 shares of common stock, of the par value of $100.00 each, all of which shares are issued and outstanding.

The Company has a plant for the manufacture of commercial fertilizers located in the county of Norfolk, and State of Virginia, and the business conducted at this plant consists of intra-state shipments to points in the State of Virginia and interstate shipments to points in North Carolina and other states. All profits from earnings of the business done in and out of Virginia by this plant
59 within the year ending December 31, 1916, after making the deductions allowed by law amounted to $260,684.00, which said amount was returned by the company as income taxable by the State of Virginia at one per cent., and the company claims that an income tax of $2,606.84 should be assessed upon it by the Commonwealth of Virginia for the year 1917, and that upon payment of said sum of $2,606.84 it will have complied with all the requirements of the law.

By far the larger part of the capital, property and assets of the F. S. Royster Guano Company are permanently invested and lo-

cated beyond the limits of the State of Virginia, and are used and employed beyond the limits of said State, the Company's plants beyond the limits of Virginia being as follows:

A plant for the manufacture of commercial fertilizers located at Curtis Bay, Anne Arundel County, Maryland, from which it ships fertilizers to points in Maryland and states north and west thereof; a plant at Tarboro, North Carolina, and a plant at Charlotte, North Carolina, from which it ships fertilizers to points in North Carolina and states west and south thereof; a plant at Columbia, South Carolina, and a plant at Spartanburg, South Carolina, from which it ships fertilizer to points in South Carolina and states west and
60 south thereof; a plant at Macon, Georgia, from which it ships fertilizers to points in Georgia and states west and south thereof, and a plant in Montgomery, Alabama, from which it ships fertilizers to points in Alabama and states west and south thereof.

In addition to its plants located beyond the limits of Virginia the F. S. Royster Guano Company maintains selling agencies in the several states in which these plants are located and commercial fertilizers manufactured at said plants are sold through these agencies for delivery in and throughout the several states of the United States, and the goods so produced and sold are loaded at the various factories beyond the limits of Virginia, billed by the railroad to the purchaser as consignee, and delivered to the purchaser at his place of business in whatever state he is located.

Under and by virtue of the law purporting to authorize the exaction of a tax on all profits from earnings of the business done in and out of Virginia, Chapter 472 of the laws of 1916, the Examiner of Records has reported to the Commissioner of the Revenue an additional sum of $270,759.00 as income taxable by the State of Virginia and the Commissioner of the Revenue has added to the $260,-
684.00 returned by the F. S. Royster Guano Company as
61 aforesaid, the sum of $270,759.00, and assessed thereon an income tax of one per cent., that is to say, the sum of $2,-
707.59, said $270,759.00 being profits from earnings of plants located outside of Virginia, and doing business outside of Virginia as aforesaid. The aggregate amount of profits from earnings of business done in and out of Virginia upon which an income tax of one per cent. has been assessed by the Commissioner of the Revenue for the year 1917, is $531,443.00 and the total amount of said tax is $5,314.43.

The F. S. Royster Guano Company is aggrieved by the added assessment of one per cent. on $270,759.00 as aforesaid, and applied for relief therefrom as authorized by law.

RICHARD McILLWAINE, JR.,
Ex. of Records.
J. VAUGHAN GARY,
Representing State Tax Board.
CADWALLADER J. COLLINS,
Atty. for F. S. Royster Guano Co.

62 And now at this day, to-wit: In the Corporation Court of the City of Norfolk, Virginia, at the Courthouse of said City, on the said 26th day of November, 1917.

F. S. ROYSTER GUANO COMPANY, Applicant,

v.

THE COMMONWEALTH OF VIRGINIA et als., Defendants.

This day came said applicant and filed its application and petition, moved the Court for an order exonerating it from the payment of an income tax to the State of Virginia of one per cent. on the sum of $270,759.00, that is to say, the sum of $2,707.59.

And it appearing that legal service of the notice of said application has been duly accepted by the Attorney for the Commonwealth of the City of Norfolk, and by the Commissioner of the Revenue for said city, it is ordered that said F. S. Royster Guano Company's application and petition be docketed.

And thereupon, the Court having fully heard the evidence both for the plaintiff and the defendant, and the same having been fully argued by counsel both for the plaintiff and defendant, and
63 the Court not being advised of its judgment, and by consent of the plaintiff and defendant by Counsel, this cause is submitted to the judgment of this Court for decision and judgment at the next term of this Court.

And afterwards, to-wit: In the Corporation Court of the City of Norfolk, Virginia, on the 2nd day of April, 1918:

Upon hearing of the application of the applicant, F. S. Royster Guano Company, for correction of an alleged erroneous assessment and to be exonerated from the payment of an income tax of one per cent. on the sum of $270,759.00 that is to say the sum of $2,707.59 for the year 1917.

The case having been submitted to this Court for decision upon the written notice of motion and petition, and upon the agreed statement of facts entered into between the applicant, by its Attorney, and the Commonwealth of Virginia, by its attorney, all of which are made part of the record, the Court, after argument of counsel, is of opinion that the applicant, F. S. Royster Guano
64 Company, should be assessed with an income tax of one per cent., on the sum of $270,759.00, that is to say the sum of $2,707.59 for the year 1917.

It is further ordered that the Clerk of this Court do certify a copy of this order to the Treasurer of the City of Norfolk, Virginia, who is hereby directed to make out against said applicant, F. S. Royster Guano Company, a tax ticket for the said tax of one per cent. on the sum of $270,759.00, that is to say, the sum of $2,707.59, and penalty for the year 1917, and he shall collect the same according to law; and it is hereby adjudged and ordered that the said applicant shall pay the same to him.

And it is further ordered that the Clerk of this Court do also certify a copy of this order to the Auditor of Public Accounts of this State.

To the foregoing judgment the applicant, F. S. Royster Guano Company, by counsel, excepted, and the said petitioner having expressed its intention to apply for a writ of error to said judgment, the execution of this order is suspended for the period of 60 days upon its giving bond in the sum of $3,000.00 conditioned according to law.

65 F. S. ROYSTER GUANO COMPANY, Petitioner,

v.

COMMONWEALTH OF VIRGINIA, Respondent.

Be it remembered that upon the further proceedings in and hearing of this cause after all the evidence had been submitted to the Court, the said evidence being set out in the agreed statement of facts entered into between the parties, by their attorneys, and filed as part of the record in the case, which said statement of facts is also made a part of this certificate just as fully as if it had been set out herein, the petitioner, F. S. Royster Guano Company, excepted to the ruling and judgment of the Court, in each and all respects, and prayed that this certificate of exceptions might be signed, sealed and enrolled, which is accordingly done.

All of which the Court hereby certifies.

ALLAN R. HANCKEL, *Judge.* [SEAL.]

66 VIRGINIA:

In the Clerk's Office of the Corporation Court of the City of Norfolk.

I, James V. Trehy, Clerk of the said Corporation Court of the City of Norfolk, do hereby certify that the foregoing and annexed is a true transcript of the record in the suit of F. S. Royster Guano Company, applicant, v. The Commonwealth of Virginia et als., defendants, lately pending in said Court.

I further certify that the said copy was not made up and completed until the defendant had had due notice of the making of the same and the intention of the applicant to take an appeal therein.

Given under my hand this 2nd day of April, 1918.

JAMES V. TREHY, *Clerk.*

Fee for this record: $5.00.

67 I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing record contained in pages numbered from 1 to 53 inclusive is a true and perfect copy of the record of the suit in the case of F. S. Royster Guano Company against the Commonwealth of Vir-

ginia remaining in the clerk's office of this court at Richmond, upon which record the case was determined by this court.

In witness and attestation whereof I hereunto set my hand and affix the seal of said court at Richmond, Virginia, on this the 29th day of June, 1918.

H. STEWART JONES,
Clerk Supreme Court of Appeals, at Richmond.

I, Stafford G. Whittle, one of the Judges and President of the Supreme Court of Appeals of Virginia, do hereby certify that the attestation of the above record in the case of F. S. Royster Guano Company against the Commonwealth of Virginia, remaining in the clerk's office of the said court at Richmond, made by H. Stewart Jones, the Clerk of said Court at Richmond, is in due form.

Given under my hand and seal this 29th day of June, 1918.

STAFFORD G. WHITTLE,
President Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of said court, do hereby certify that the Honorable Stafford G. Whittle, whose genuine signature is attached to the foregoing certificate, was, at the time of signing and attesting the same, Pre-ident of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and seal of said court this the 29th day of June, 1918.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: File No. 26645. Virginia Supreme Court of Appeals. Term No. 559. F. S. Royster Guano Company, plaintiff in error, vs. The Commonwealth of Virginia. Filed July 13th, 1918. File No. 26645.

Supreme Court of the United States

October Term, 1918.

No. 5[redacted]165

F. S. ROYSTER GUANO COMPANY,

Plaintiff in Error,

v.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR

CADWALLADER J. COLLINS,

Counsel for Plaintiff in Error.

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Supreme Court of the United States

October Term, 1918.

No. 559

F. S. ROYSTER GUANO COMPANY,

Plaintiff in Error,

v.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF CASE.

This case originated in the Corporation Court of the City of Norfolk, Virginia, to be exonerated and relieved, as provided by Sec. 567 of the Code of Virginia and Acts amendatory thereof or supplementary thereto, from the payment of an income tax amounting to $2,707.59 illegally assessed and imposed upon the plaintiff in error by the Commonwealth of Virginia.

The plaintiff in error applied to the Supreme Court of Appeals of Virginia for the allowance of a

writ of error and supersedeas to the judgment of the Corporation Court of the City of Norfolk and the Supreme Court of Virginia denied a writ of error to the judgment of the trial court. The order entered by the Supreme Court of Appeals disposes of the case upon the merits by giving the sanction of an affirmance of the judgment of the trial court and the writ of error runs to the highest Court. (Rec. 19; Norfolk Turnpike Co. v. Virginia, 225 U. S. 264.)

The case was heard upon the petition and statement of agreed facts.

The case raises the question whether the law of Virginia imposing a net income tax derived from profits from earnings of plants belonging to plaintiff in error, located beyond the limits of Virginia and doing business outside of Virginia, is unconstitutional on the following grounds:

1. That it violates the requirement for equal protection of the law.
2. That it takes property without due process of law.
3. That it imposes an unlawful burden on interstate commerce.

In Virginia domestic corporations that do no business within the State and domestic corporations doing business and having a plant within the State pay the same annual registration fee and the same annual State Franchise Tax (Pollard's Supplement to the Virginia Code, 1916, Tax Bill, Sections 41 and 43, pp. 590, 592), and in addition to this Tax a domestic corporation doing business and having a plant within the State has its real estate and plant taxed upon an ad valorem basis in the county or city where they are

located, and its stock on hand, raw material for use in business, accounts receivable, bills receivable and money on hand and on deposit, etc., are taxed upon an ad valorem basis in the county or city where the corporation's principal office is located. The provisions of law under which a tax is imposed on the real estate and plant of a domestic corporation are the provisions relating to the valuation of all real estate for purposes of taxation as set forth in the Code of 1904, Sections 437, 441 and 447, and need not be further referred to (Tabb v. Commonwealth, 98 Va., p. 49), and the provision of law under which an ad valorem tax was imposed upon the plaintiff in error for the year 1917 upon its stock on hand, raw material for use in business, accounts receivable, bills receivable and money on hand and on deposit, etc., is set forth in Chapter 382, page 655, of the Acts of the General Assembly of Virginia for the year 1916.

In addition to the tax levied upon an ad valorem basis upon the real estate, chattels and choses in action of domestic corporations doing business and having a plant in Virginia, the State obtains revenue from extra territorial sources by levying a State Tax on the net income of these corporations derived from plants located beyond the limits of Virginia, but it excludes from the provisions of the income tax law all corporations incorporated under the laws of Virginia which do no part of their business in the State.

The provision of law under which the income tax in question in the case at bar was imposed upon the plaintiff in error was by Chapter 472, page 793, of the Acts of the General Assembly of Virginia for the year 1916, so amended as to include corporations for the first time, and the distinct provision excluding Domes-

tic Corporations without a plant located in Virginia but transacting business beyond the limits of Virginia from the payment of all income and ad valorem taxes is set forth in Chapter 495, page 830, of the Acts of the General Assembly of Virginia for the year 1916.

This provision of law exempting Domestic Corporations without a plant located in Virginia from any income tax has created a tax system whereby they enjoy an advantage equal to the amount of the State Tax on net incomes derived from plants located beyond the limits of Virginia and belonging to Domestic Corporations having a plant in Virginia.

The plaintiff in error has complied with the provisions of law under which taxes were imposed for the year 1917 upon its real estate and plant located in Virginia, and upon its stock on hand, raw material for use in business, accounts receivable, bills receivable and money on hand and on deposit having a situs, for purposes of taxation, in Virginia, and also upon its income derived from commercial fertilizers produced at its plant located within the State of Virginia, notwithstanding the fact that in disposing of commercial fertilizers produced at its Virginia factory the intrastate shipments were of trifling amount compared with the interstate shipments, but it refused to pay an income tax derived from commercial fertilizers produced at its extra-State branches and sold and delivered from these extra-State branches to extra-State customers, and it brought the petition in this case alleging that as applied to income derived from these extra-State branches the provisions of the Virginia income tax law in question are unconstitutional.

The statement of agreed facts upon which this case was heard is as follows:

"IT IS HEREBY AGREED by and between the parties to this petition that for the purposes of this petition the following facts shall be taken as true and that the Court shall be at liberty to draw inferences of fact from the facts hereinafter stated:

"The F. S. Royster Guano Company is a corporation established under the laws of the State of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. Its principal office is in the City of Norfolk, Virginia, and its total authorized capital stock is $2,500,000.00, divided into 10,000 shares of preferred and 15,000 shares of common stock, of the par value of $100.00 each, all of which shares are issued and outstanding.

"The Company has a plant for the manufacture of commercial fertilizers located in the County of Norfolk, and State of Virginia, and the business conducted at this plant consists of intrastate shipments to points in the State of Virginia and interstate shipments to points in North Carolina and other States. All profits from earnings of the business done in and out of Virginia by this plant within the year ending December 31, 1916, after making the deductions allowed by law amounted to $260,684.00, which said amount was returned by the company as income taxable by the State of Virginia at one per cent., and the company claims that an income tax of $2,606.84 should be assessed upon it by the Commonwealth of Virginia for the year 1917, and that upon payment of said sum of $2,606.84 it will have complied with all the requirements of the law.

"By far the larger part of the capital, property and assets of the F. S. Royster Guano Company are permanently invested and located beyond the limits of the State of Virginia, and are used and employed beyond the limits of said

State, the Company's plants beyond the limits of Virginia being as follows:

"A plant for the manufacture of commercial fertilizers located at Curtis Bay, Anne Arundel County, Maryland, from which it ships fertilizers to points in Maryland and States north and west thereof; a plant at Tarboro, North Carolina, and a plant at Charlotte, North Carolina, from which it ships fertilizers to points in North Carolina, and States west and south thereof; a plant at Columbia, South Carolina, and a plant at Spartanburg, South Carolina, from which it ships fertilizers to points in South Carolina and States west and south thereof; a plant at Macon, Georgia, from which it ships fertilizers to points in Georgia and States west and south thereof, and a plant in Montgomery, Alabama, from which it ships fertilizers to points in Alabama, and States west and south thereof.

"In addition to its plants located beyond the limits of Virginia the F. S. Royster Guano Company maintains selling agencies in the several States in which these plants are located and commercial fertilizers manufactured at said plants are sold through these agencies for delivery in and throughout the several States of the United States, and the goods so produced and sold are loaded at the various factories beyond the limits of Virginia, billed by the railroad to the purchaser as consignee, and delivered to the purchaser at his place of business in whatever State he is located.

"Under and by virtue of the law purporting to authorize the exaction of a tax on all profits from earnings of the business done in and out of Virginia, Chapter 472 of the Laws of 1916, the Examiner of Records has reported to the Commissioner of the Revenue an additional sum of $270,759.00 as income taxable by the State of Virginia and the Commissioner of the Revenue has added to the $260,684.00 returned by the F. S. Royster

Guano Company as aforesaid, the sum of $270,-759.00, and assessed thereon an income tax of one per cent., that is to say, the sum of $2,707.59, said $270,759.00 being profits from earnings of plants located outside of Virginia, and doing business outside of Virginia as aforesaid. The aggregate amount of profits from earnings of business done in and out of Virginia upon which an income tax of one per cent. has been assessed by the Commissioner of the Revenue for the year 1917, is $531,443.00 and the total amount of said tax is $5,314.43.

"The F. S. Royster Guano Company is aggrieved by the added assessment of one per cent. on $270,759.00 as aforesaid, and applied for relief therefrom as authorized by law."

Record, pp. 24, 25.

The provisions of the laws of Virginia providing for the assessment, collection and recovery of taxes upon corporations in the position of the plaintiff in error, so far as they are material to the decision of this case, are as follows:

Sec. 567 of the Code of 1904 as amended:

"*Redress against erroneous assessment of taxes.*

"Any person assessed with taxes on lands or other property, aggrieved by any such assessment, may, unless otherwise specifically provided by law, within two years from the first day of September of the year in which such assessment is made, and any person assessed with a license tax, aggrieved thereby, may, within one year after such assessment, apply for relief to the court in which the commissioner gave bond and qualified, or to which or to whose clerk such bond and the certificate of his qualification were returned; except, that where it is shown to the satisfaction

of the court that there has been a double assessment of the same property in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, but that the erroneous tax has not been paid, the court may order that the applicant be exonerated from the payment of such erroneous assessments, even though the application be not made within two years as hereinbefore required. The attorney for the Commonwealth shall defend the application; and no order made in favor of the applicant shall have any validity unless it is stated therein that such attorney did so defend; that the commissioner making the assessment, or his successor, was examined as a witness touching the application, and the facts proved to be certified.

"Whereas, the authorities are now enforcing the payment of all delinquent taxes whether doubly assessed or not, and the taxpayers have no adequate remedy against it, an emergency exists, and this act shall be in force from its passage."

Sec. 568 of the Code of 1904:

"*When court may order assessment to be corrected and money refunded.*

"If the court be satisfied that the applicant is erroneously assessed with any taxes, and that the erroneous assessment was not caused by the failure or refusal of the applicant to furnish a list of his property, real and personal, to the commissioner, on oath, as the law requires; or that the applicant is erroneously charged with a license tax, and that the erroneous assessment was not caused by the failure or refusal of the applicant to furnish the commissioner, on oath, with the necessary information, as required by law, in either case the court may order that the assessment be corrected. If the assessment exceeds the

proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously charged, if not already paid, and if paid, that it be refunded to him. If the assessment be less than the proper amount, the court shall order that the applicant pay the proper taxes. A copy of any order made under this section correcting an erroneous assessment shall be certified by the court to the auditor of public accounts and the treasurer of the State."

Acts 1916, Chap. 382:

"Section 8. The classification under 'Schedule C' shall be as follows:

"Second. All capital of persons, firms and corporations employed in a trade or business not otherwise taxed; and, in case of a corporation when all of such capital is taxed by this State, the shares of its stock in the hands of individual shareholders shall not be further taxed for State purposes. But real estate belonging to such persons, firms and corporations shall not be held to be capital, but shall be listed and taxed as real estate.

" 'Capital,' as used in the tax laws, shall be construed 'net assets,' as hereinafter defined.

" 'Net assets' with reference to persons, firms and corporations engaged in a business subject by the laws of this State to a tax on capital, shall be construed to mean the gross assets of such person, firm, company or corporation less such deductions as are hereinafter set out.

"The gross assets are defined as follows:

"(1) The money realized from the sale of shares of stock or the money adventured in the business.

"(2) The inventory of stock on hand.

"(3) All raw materials for use in the business whether at the place of business, in storage, or elsewhere.

"(4) Accounts receivable.

"(5) Bills receivable.

"(6) All machinery and tools not taxed as real estate.

"(7) Money on hand and on deposit.

"(8) All other property of any kind whatsoever, including all choses in action, equities, demands and claims.

"The deductions which may be allowed in ascertaining 'net assets' are as follows:

"(1) Salaries due officers and employees on the pay-roll.

"(2) Interest charges due and accrued.

"(3) Money borrowed represented by notes or other obligations contracted within the period of six months prior to February first, may be allowed as a further reduction, provided that all money so borrowed can be clearly shown to be represented by property enumerated in the return of gross assets.

"The excess of the gross assets over the deductions, as above defined, shall be deemed and treated as 'net assets' which shall, wherever the laws of this State require a tax on capital, be taxed at the rate of seventy cents per hundred.

"When the amount of such aforesaid borrowed money and other deductions are in excess of the 'net assets' as hereinbefore defined, then such excess shall be assessed and taxed as capital.

"Every person, firm and corporation engaged in a business whose capital is subject by the laws of this State to taxation, is hereby required to keep accounts showing the above items, which shall at all times be open to the inspection of the commissioners of the revenue, the examiners of

records, local boards of review, and the State *advisory board on taxation; and every such* person, firm or corporation shall be required to make a return under oath to the commissioner of the revenue, on forms prescribed by the auditor of public accounts, showing the items of gross assets as above defined, and also the items of deductions as above defined, and shall also furnish a list under oath to the commissioner of revenue giving the names, addresses and amounts of all indebtedness deducted as authorized above, and shall further certify that such indebtedness was made in the usual course of business and is represented in the gross assets returned as above.

"Nothing herein shall prevent cities and towns of this Commonwealth from imposing a license tax on merchants, mercantile firms or corporations, based on their purchases or otherwise, in pursuance of their respective charters, or of the general laws of the State for the government of cities and towns.

"Where any person, firm or corporation domiciled and doing business in this State maintains a branch of such business outside of this State, no part of the capital of such person, firm or corporation permanently invested in any such branch of its business, nor any intangible assets, arising from business originating at any such branch and transacted outside of this State, shall be considered as situated in this State for the purpose of taxation or be assessed with taxes in this State—any statutory provisions or rule of construction to the contrary notwithstanding—it being the intent and purpose of this provision to exact of citizens of this State no higher or greater tax than that exacted of non-residents doing business in this State."

Acts 1916, Chapter 472:

"Section 10. The classification under Schedule D providing for the taxation of income shall be as follows, to-wit:

"The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding the first of January in each year, subject to the deductions and exemptions herein below recited.

"Income shall include:

"1st. All rents, except ground rents or rents charge, salaries, wages, fees or compensation of whatever kind from professions, vocations or other services.

"2nd. All interest upon notes, bonds, or other evidences of debt of every description, including those of other States or other countries (except bonds of this State and bonds of the United States), of any corporation, company, partnership, firm or individual, all dividends derived from stocks or other evidences of ownership or interest in property, but not including dividends paid in stock; all royalties derived from mines, patents, copyrights, or the possession or use of franchises or legalized privileges of any kind; and all annuities from invested funds or trusts; provided, that the proceeds of life insurance policies paid upon the death of the person insured or payments made by or credited to the insured on life insurance, endowment, or annualty contracts, upon the return thereof to the insured at maturity of the term mentioned in the contract, or upon surrender of contract, shall not be included as income.

"3rd. All profits from earnings of any partnership or business done in or out of Virginia, due and paid or accrued, whether apportioned in any manner or not; and all profits derived from the sale of real or personal estate.

"4th. The amount of sales of live stock and meat of all kinds less the actual purchase price of

live stock the sales of which are reported as income.

"5th. The amount of sales of wood, butter, cheese, hay, tobacco, grain and other vegetables and agricultural productions during the preceding year, whether the same was grown during the preceding year or not, less all sums paid for taxes, and for labor, fences, feed, fertilizers and seed purchased and used upon the land upon which the vegetables and agricultural productions were grown or produced, and the rent of said land paid by said persons, if he be not the owner thereof.

"6th. All other gains and profits derived from any source whatever.

"There shall be exempt from taxation under this schedule income of each taxpayer as follows:

"(a) To an individual income up to and including the sum of twelve hundred dollars.

"(b) To husband and wife, income up to and including the sum of eighteen hundred dollars.

"(c) For each unmarried natural or legally adopted child under the age of twenty-one years the sum of two hundred dollars.

"Provided, that only one deduction of the specified sums aforesaid shall be made from the aggregate income of any family except that guardians may make a separate deduction of twelve hundred dollars in favor of each ward, out of income coming to such ward.

"In addition to the foregoing exemptions, there shall be deducted from the income of the person or corporation assessed the following:

"1. The actual amount paid during the year for repairs to buildings, the rent of which is reported as income, all interest on existing personal indebtedness, all taxes, and all fire insurance premiums due and paid during the year.

"2. All necessary expenses actually paid in carrying on any individual or corporation business, not including personal, living or family expenses, paid during the year, and not including books,

tools, instruments, machinery, appliances, furniture or fixtures or other taxable property purchased, whether used in connection with the business or not.

"3. All losses of property and such as are incurred in lawful business, actually sustained during the year, and not compensated for by insurance or otherwise.

"4. All debts due to the taxpayer actually ascertained to be worthless and actually charged off within the year.

"The auditor shall prepare and furnish to the commissioners of the revenue necessary forms of interrogatories for the assessment of the income tax separate and distinct from other forms of interrogatories.

"Each individual whose income is taxable under this section shall report profits and dividends received from any business in which the individual is interested or owns stock, showing the source from which received and the amount received, but he shall not be taxable on those profits and dividends provided such profits and dividends are reported for assessment by the person or corporation conducting the business; otherwise the individual shall be taxable on such profits and dividends as income."

Acts 1916, Chapter 495:

"Whereas, certain corporations have been organized under the laws of Virginia, and it is anticipated that certain others will be organized thereunder, which do no business within this State; therefore

"1. Be it enacted by the general assembly of Virginia, That no income tax nor ad valorem taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under the laws of this State which do no part of

their business within this State; and the mere holding of stockholders meetings in this State by such corporations required by law, shall not be construed as doing any business in this State within the meaning of this act; provided, however, that if while any such intangible property is subject to any taxation under the laws of this State, it be assigned or transferred to any such corporation, such property shall continue to be subject to all taxation now or hereafter imposed by law just as if such assignment or transfer had not been made. All liens on such property for taxes now or hereafter provided for by law are hereby preserved, and such taxes may be assessed either against the assignor or the assignee, and however assessed may be collected of either by any of the methods now or hereafter provided for by law."

BRIEF OF ARGUMENT.

The Exaction in Question Denies the Plaintiff in Error the Equal Protection of the Law.

The law excluding domestic corporations without a plant located in Virginia from the payment of all income and ad valorem taxes is set forth in Chapter 495, page 830, Acts of 1916, the provisions of which have already been quoted. Corporations to which the Legislature has considered this exemption applicable have their principal places of business and chief works outside of the State and pay no taxes to Virginia upon their property, real or personal. True they pay an annual registration fee and State franchise tax graduated according to their authorized capital stock but this registration fee and franchise tax are the same upon every corporation which obtains a charter from the State of Virginia. Upon what principle can it be

said that there is a distinction between a domestic corporation with a plant in Virginia and a plant or plants outside of Virginia and a domestic corporation without a plant in Virginia but with a plant or plants outside of Virginia, so far as their extra-State plants are concerned? They are both corporations of Virginia, both citizens of the State, and both are governed by the same law in respect to their organization and powers conferred for the transaction of business. The States which protect their extra-State plants have a right to demand from both classes, as pay for that protection, a tax upon real and personal property within such States, and a tax upon income, measured by that part of the income which comes from business transacted within such States. In addition to this extra-State tax the class with a plant in Virginia pays to Virginia a tax upon its real and personal property in the State and a tax upon its net income derived from the plant in Virginia and from its extra-State plants. The class without a plant in Virginia pays no tax upon any property, real or personal, and is exempt from paying a tax upon its net income derived from extra-State plants.

There is no real distinction between the taxed and non-taxed corporations so far as their extra-State plants are concerned. If both classes of corporations are organized for the purpose of transacting the same kind of business there is no difference in the way they do business and its results. The exempt extra-State plants are used for profit making purposes to the same extent as the taxed extra-State plants are, except that in terms of earnings the taxed extra-State plants have less to return, as dividends, to the owners of the capital stock.

It is respectfully submitted that there is a clear discrimination against the taxed extra-State plants as distinguished from the non-taxed extra-State plants, and that the exemption is arbitrary and hence illegal.

The Exaction in Question Takes the Property of the Plaintiff in Error Without Due Process of Law.

The statute in question applies to the net income of domestic corporations derived from plants located in Virginia and also from extra-State plants and the source of the income so far as extra-State plants are concerned is beyond the jurisdiction of the Commonwealth. In the case of American Manufacturing Company v. City of St. Louis, decided by this court on June 9th, 1919, U. S. Adv. Ops. 1918–19, p. 656, a tax on the manufacturing business of a West Virginia corporation ascertained by and proportioned to the amount of sale of goods manufactured in the local factory whether sold within or without the State of Missouri, and whether in domestic or interstate commerce, was sustained. We submit that the practical operation and effect of this decision is to give the State in which a plant is located the right to tax net incomes derived from the sale of goods manufactured in the local factory and therefore the situs for taxation of net incomes is in the State where the goods are produced from which the net income is derived.

The Virginia Statute as Applied to the Plaintiff in Error Imposes an Unlawful Burden on Interstate Commerce.

In the case of United States Glue Company v. Town of Oak Creek, 247 U. S. 321, this Court upheld

a general income tax upon the net profits of domestic corporations derived from the sale of goods manufactured in local factories whether sold within or without the State. In this case a distinction was made in the lower Court between net income derived from the sale of goods manufactured in local factories and net income derived from the sale of goods manufactured in extra-State factories and sold without the State. After summarizing the sources from which net income was derived this Court said:

> "No contention was made as to the taxability of the income designated in item (a). Plaintiff's contention that items (d) and (e) were not taxable because not derived from property located or business transacted within the State was upheld by the State courts."

By reference to the statement of agreed facts it will be seen that plaintiff paid without question a net income tax derived from commercial fertilizers manufactured in its Virginia factory and sold within and without the State of Virginia, regardless of the fact that the greater part of the goods manufactured at this factory were sold outside the State, but it refused to pay a net income tax derived from commercial fertilizers manufactured at its extra-State factories and sold outside the State.

In the present case the question is whether a State in levying an income tax upon the gains and profits of a domestic corporation having a plant within the State and extra-State plants may include in the computation the net income derived from extra-State plants doing a manufacturing business outside of the State, and selling the goods so manufactured outside of the State, other domestic corporations without a plant

within the State but having extra-State plants, being exempted by law from the payment of an income tax.

A system of taxation which lays a tax upon all income of a domestic corporation simply because it has a plant in Virginia and exempts a domestic corporation without a plant in Virginia from any income tax in effect confers upon the domestic corporation without a plant in the State of Virginia a pecuniary bounty equal to the amount of the tax from which it is exempted.

We respectfully submit that, so far as extra-State plants are concerned, it is an invalid regulation of interstate commerce to allow domestic corporations without a plant within the State but having extra-State plants to be subsidized by exemptions from burdens that domestic corporations having a plant within the State and extra-State plants must bear.

We submit, therefore, that the Supreme Court of Virginia erred in upholding the constitutionality of the Virginia law imposing a net income tax derived from earnings of plants belonging to the plaintiff in error, located beyond the limits of Virginia and doing business outside of Virginia and that, accordingly, its order affirming the judgment of the Corporation Court of the City of Norfolk should be reversed.

Respectfully submitted,

CADWALLADER J. COLLINS,

Counsel for Plaintiff in Error.

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

SUPREME COURT OF THE UNITED STATES

October Term 1919.

No. 165.

F. S. ROYSTER GUANO COMPANY

v.

COMMONWEALTH OF VIRGINIA

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF ON BEHALF OF COMMONWEALTH OF VIRGINIA

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case comes upon a writ of error from this court allowed by the President of the Supreme Court of Appeals of Virginia to review the final decision of that court in refusing a writ of error to the judgment and order of the corporation court of the city of Norfolk, Virginia, sustaining an income tax assessed against the plaintiff in error for the year 1917, (R. pp. 26, 17, 19) and concerns Section 10 of the Virginia general tax statute, as amended in 1916. This statute imposes on all persons or corporations in the State, an annual net income tax based, so far as the question raised in this proceeding is concerned, on all profits from earnings of any business done in or out of Virginia, due or paid or accrued.

The plaintiff in error, the Royster Guano Company, hereinafter for convenience designated as "the plaintiff," is a corporation organized under the laws of Virginia, with its principal office in the city of Norfolk, in the State of Virginia, and is engaged in the manufacture and sale of commercial fertilizers. The corporation has a plant for the manufacture of such fertilizers located in the county of Norfolk, State of Virginia, and from this plant, its product is sold and shipped both within and without the State of Virginia. The business done at this plant consists of intrastate shipments and interstate shipments to other States. The corporation also has plants for the manufacture of commercial fertilizers, located in various other states, and maintains in these states selling agencies for the sale of the products so manufactured, the sales being made and the products delivered through the various states of the Union. (R. pp. 24, 25.)

Section 10 of the Virginia Tax Laws (Acts of Assembly 1916, p. 794), reads as follows:

"Sec. 10. The classification under schedule D providing for the taxation of income shall be as follows, to-wit:

"The aggregate amount of income of each person or corporation, whether received or due but not received within the year next preceding the first of January in each year, subject to the deductions, and exemptions herein below recited.

"Income shall include.

"1st. All rents, except ground rents or rents charge, salaries, wages, fees or compensation of whatever kind from professions, vocations or other services.

"2nd. All interest upon notes, bonds, or other evidences of debt of every description, including those of other States or other countries (except bonds of this State and bonds of the United States), of any corporation, company, partnership, firm or individual, all dividends derived from stocks or other evidences of ownership or interest in property, but not including dividends paid in stock; all royalties derived from mines, patents, copyrights, or the possession or use of franchises or legalized privileges of any kind; and all annuities from invested funds or trusts; provided, that the proceeds of life insurance policies paid upon the death of the person insured or payments made by or credited to the insured on life insurance, endowment, or annualty contracts, upon the return thereof to the

insured at the maturity of the term mentioned in the contract, or upon surrender of contract, shall not be included as income.

"3rd. *All profits from earnings of any partnership or business done in or out of Virginia, due and paid or accrued,* whether apportioned in any manner or not; and all profits derived from the sale of real or personal estate.

"4th. The amount of sales of live stock and meat of all kinds less the actual purchase price of live stock, the sales which are reported as income.

"5th. The amount of sales of wood, butter, cheese, hay, tobacco, grain and other vegatables and agricultural productions during the preceding year, whether the same was grown during the preceding year or not, less all sums paid for taxes, and for labor, fences, feed, fertilizers and seed purchased and used upon the land upon which the vegetables and agricultural productions were grown or produced, and the rent of said land paid by said persons, if he be not the owner thereof.

"6th. All other gains and profits derived from any source whatever. There shall be exempt from taxation under this schedule income of each tax payer as follows:

"(a) To an individual income up to and including the sum of twelve hundred dollars.

"(b) To husband and wife, income up to and including the sum of eighteen hundred dollars.

"(c) For each married natural or legally adopted child under age of twenty-one years the sum of two hundred dollars.

"Provided, that only one deduction of the specified sums aforesaid shall be made from the aggregate income of any family except that guardians may make a separate deduction of twelve hundred dollars in favor of each ward, out of income coming to such ward.

"In addition to the foregoing exemptions, there shall be deducted from the income of the person or corporation assessed the following:

"1. The actual amount paid during the year for repairs to buildings, the rent of which is reported as income, all interest on existing personal indebtedness, all taxes, and all fire insurance premiums due and paid during the year.

"2. All necessary expenses actually paid in carrying on any individual or corporation business, not including personal, living or family expenses, paid during the year, and not including books, tools, instruments, machinery, appliances, furniture or fixtures or other taxable property purchased, whether used in connection with the business or not.

"3. All losses of property and such as are incurred in lawful business, actually sustained during the year, and not compensated for by insurance or otherwise.

"4. All debts due to the taxpayer actually ascertained to be worthless and actually charged off within the year.

"The auditor shall prepare and furnish to the commissioners of the revenue necessary forms of interrogatories for the assessment of the income tax separate and distinct from other forms of interrogatories.

"Each individual whose income is taxable under this section shall report profits and dividends received from any business in which individual is interested or owns stock, showing the source from which received and the amount received, but he shall not be taxable on those profits and dividends provided such profits and dividends are reported for assessment by the person or corporation, conducting the business; otherwise the individual shall be taxable on such profits and dividends as income." (Italics supplied.)

That portion of the section which is involved in the controversy before this court is italicized in the quotation above, and provides "3rd. All profits from earnings of any partnership or business done in or out of Virginia, due and paid or accrued."

The forms of interrogatories for the assessment of the income tax, were furnished by the Auditor as above provided, and the plaintiff in accordance with the last paragraph of Section 10 above set out, for the year 1917, returned for taxation the profits from earnings of business done by the plant located in the county of Norfolk, Virginia, both in and out of Virginia, the earnings of both interstate and intrastate business,—but no other income was reported for taxation. The taxing officer thereupon added to the sum returned by the plaintiff, the profits from earn-

ings of the plants of the plaintiff located outside of Virginia, and assessed an income tax on the aggregate amount of the net profits so arrived at by the taxing officer.

There is no dispute of the amount of the net profits or income thus taxed, the only contention of the plaintiff being that a State cannot tax the net income of one of its corporations, a domestic corporation, derived from business carried on entirely outside of the State. To test the soundness and validity of its contention, the plaintiff made application to the corporation court of the city of Norfolk, Virginia, to be relieved of the taxes assessed against that part of the net income derived from the earnings of the plants of the corporation located beyond the limits of Virginia and doing business outside of Virginia (R. pp. 20. 22). The corporation court sustained the assessment of taxes on the net earnings of the plants located outside of Virginia and doing business outside of Virginia (R. p. 26). The plaintiff then filed petition in the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the said order of the corporation court of the city of Norfolk. The Supreme Court refused the writ of error and supersedeas, at the same time affirming the judgment of the corporation court of the city of Norfolk (R. p. 19). Thereupon a writ of error from this court was allowed by the President of the Supreme Court of Appeals of Virginia upon the petition of the plaintiff.

ASSIGNMENT OF ERROR.

Three assignments of error are relied on in the petition for writ of error from this court. It is charged that the statute in question, so far as it imposes a net income tax on the profits derived from the earnings of plants belonging to this domestic corporation located outside of the

State of Virginia and doing business outside of the State of Virginia, is in conflict with the Constitution of the United States for the following reasons:

1. Because it violates the requirement of equal protection of the laws.

2. Because it takes property without due process of law.

3. Because it imposes an unlawful burden on interstate commerce.

These three reasons constitute the assignments of error before this court and will be considered in the order in which they appear above.

ARGUMENT.

I.

THE TAX IN QUESTION DOES NOT DENY THE PLAINTIFF THE EQUAL PROTECTION OF THE LAWS.

The plaintiff contends that it is denied the equal protection of the laws because af the provisions of Chapter 495 of the Acts of Assembly 1916, which reads as follows:

> "That no income tax nor ad valorem taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under laws of this State which do no part of their business within this State; and the mere holding of stockholders meetings in this State by such corporations required

by law, shall not be construed as doing any business in this State within the meaning of this act; provided, however, that if while any such intangible property is subject to any taxation under the laws of this State, it be assigned or transferred to any such corporation, such property shall continue to be subject to all taxation now or hereafter imposed by law just as if such assignment or transfer had not been made. All liens on such property for taxes now or hereafter provided for by law are hereby preserved, and such taxes may be assessed either against the assignor or the assignee, and however assessed may be collected of either by any of the methods now or hereafter provided for by law."

It is readily seen that this act only exempts certain intangible property from certain taxation, that is to say, it exempts from any income or ad valorom tax only the "stocks, bonds, investments, capital, or other intangible property" owned by domestic corporations that do *no business* in Virginia. This is the entire scope of the exemption. Any other property domestic corporations doing no business in Virginia may have is not exempt from taxation by this act, and even the intangibles owned by such corporations are subject to taxation if they were subject to taxation when those corporations acquired them. The act in question was not enacted until 1916, and was not intended to exempt from taxation, because they were acquired by domestic corporations doing business in Virginia, those intangibles being taxed when acquired. The act was manifestly for the purpose alone of exempting from taxation the *intangible property* that corporations doing business in Virginia then owned, and such after acquired intangibles as were not taxable in this State.

The plaintiff claims that such exemption denies it the equal protection of the laws. It admits that an income tax should be assessed against it by the Commonwealth of Virginia on both the intrastate and *interstate business* carried on at the plant located in Virginia (R. p. 24). It does not contend that such a tax denies it the equal protection of the laws, even though, under Chapter 495 above quoted, corporations doing no business in Virginia are exempted from all income taxes. But the plaintiff contends that, when the State taxes the income derived by the plaintiff from its plants located outside of the State, and exempts from taxation the income of corporations that do *no business* in Virginia, it is denied the equal protection of the laws because of Chapter 495. The same reasoning which necessitates the admission by the plaintiff that the tax on the net income derived from the business carried on outside of the State by the plant located in the State does not deprive it of the equal protection of the laws, sustains the tax on the net income derived from all the business of the corporation wherever carried on. If a tax on the net income from the interstate business done by the plants of the plaintiff located in Virginia, and at the same time an exemption from taxation of corporations which do no business in Virginia does not deny the plaintiff the equal protection of the laws, then the tax on the net income of *all the business* of the plaintiff, including that done by its plants located beyond the State, and at the same time the exemption from taxation on income of corporations which do *no business* in Virginia does not deny the plaintiff of the equal protection of the laws. The same principle which sustains the constitutionality of the first taxation, sustains the constitutionality of the second taxation.

The whole contention of counsel for the plaintiff under this assignment of error is that the exemption in question

is an arbitrary discrimination against his client and that this denies it the equal protection of the laws; or, expressed differently, that the classification complained of denies the plaintiff the equal protection of the laws guaranteed it. The whole question in this assignment of error is, therefore, the validity of the classification in question.

The question of classification for the purpose of taxation, so far as it involves the 14th Amendment of the Federal Constitution, has many times been before this court, and by its decisions certain principles have been firmly established. The right and broad power of the Legislatures to select and classify the subjects has been repeatedly recognized by this court. In *Bell Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, Mr. Justice Brady, in delivering the opinion of the court, said (L. ed. 895):

> "* * * We think that we are safe in saying that the XIVth Amendment was not intended to compel the States *to adopt an iron rule of equal taxation.* If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt." (Italics supplied.)

This excerpt has been frequently quoted and approved by this court in subsequent decisions.

In *Michigan C. R. Co.* v. *Powers*, 201 U. S., 245, 293, 50 L. Ed. 744, 761, the court said (p. 292):

> "* * * We have had frequent occasion to consider questions of State taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over State taxation, and, in respect to the latter, the State has, speaking generally, the freedom of a sovereign, both as to objects and methods. It was well said by Judge Wanty, delivering the opinion of the circuit court in this case (p. 232):
>
> " 'There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the 14th Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. *It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.* *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Giozza* v. *Tiernan*, 148 U. S. 657, 662, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 228, 41 L. ed. 683, 697, 17 Sup Ct. Rep. 305; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S.

283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Billings* v. *Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Merchants' & M. Nat. Bank* v. *Pennsylvania, supra; Kentucky Railroad Tax Cases*, 115 U. S. 321 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Gulf, C & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Clark* v. *Titusville*, 184 U. S. 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *New York* v. *Barker*, 179 U. S. 299, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *Charlotte, C. & A. R. Co.* v. *Gibbs*, 142 U. S. 386, 35 L. ed. 1051; 12 Sup. Ct. Rep. 255; *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; *Kidd* v. *Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401; *Turpin* v. *Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *Florida C. & P. R. Co.* v. *Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176.'" (Italics supplied.)

Again, in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 247 U. S., 132, Mr. Justice Day, in delivering the opinion of the court, said (p. 139):

> "This brings us to the question whether the statute denies to the company the equal protection of the laws. That the State is not, because of the 14th Amendment, required to tax all property alike, and may classify the subject selected for taxation, is too well established to require citation of the many cases in this court which have so held. The classi-

> fication may not be arbitrary and must rest upon real differences; subject to these qualifications the State has a wide discretion. * * * "

It is true that there must be no arbitrary and unreasonable discrimination, "but when there is a difference, it need not be great or conspicious in order to warrant classification". *Keeney* v. *New York*, 222 U. S. 525, 536, 56 L. ed. 299, 305.

In *Citizens Telephone Company* v. *Fuller*, 229 U. S. 322, this court, in discussing the question of classification for taxation, said (p. 329):

> "It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation. There is certainly as great a power, and the rule appellant urges cannot be adopted. It is inconsistent with the principle of classification and under the cases which have explained the principle and the range of its legal exercise."

The court afterward continued by citing a number of cases, including *Bell Gap Railroad Company* v. *Pennsylvania*, 134 U. S. 232, 237, and concludes with the following words (p. 331):

> "To these cases may be added others. They illustrate the power of the legislature of the State over the subjects of taxation, and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. *Cook* v. *Marshall County*, 196 U. S. 261, 274; *Missouri* v. *Dock-*

> *ery*, 191 U. S. 165. The cases decided subsequent to the decision in *Bell's Gap R. Co.* v. *Pennsylvania* have applied its principle to many varying instances. Granting the power of classification, we must grant government the right to select the differences upon which the classification shall be based, *and they need not be great or conspicuous. Keeney* v. *New York*, 222 U. S. 536. The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.' See *Quong* v. *Kirkendall*, 223 U. S. 59, 62, 63. Thus defined and thus limited, it is a vital principle, giving to government freedom to meet its exigencies, not binding its action by rigid formulas, but *apportioning its burdens, and permitting it to make those 'discriminations which the best interests of society require.'*"

This court has also recognized that the question of differences as to the basis of classification is, in a large measure, a matter for the judgment of the Legislature. As expressel by Winslow, C. J., in *Northwestern Mutual Life Insurance Co.* v. *State*, 163 Wis. 484 (p. 491):

> "The question whether there are substantial differences of condition reasonably suggesting the propriety of difference of treatment is primarily a legislative question, and the legislative judgment is not to be disturbed by the courts unless legislative action has clearly passed the boundaries of reason. Given the difference of condition above referred to and the field of legislative action is very broad. The legislative judgment is not to be inter-

> fered with merely because the judicial mind might reach a different conclusion as to the policy or wisdom of the law nor unless the court can confidently say that no reasonable ground can be discovered to support the classification."

In *Bell Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232-237, the court said:

> " * * * All corporate securities are subject to the same regulation. The provision in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. * * * *All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution.* * * * (Italics supplied).

Recognizing the wide range which can be exercised in classification by the State, without offending against the 14th Amendment, and recognizing that the differences upon which classifications are made need not be great or conspicuous, and are largely a question of legislative judgment, this court has, time and again, sustained the classifications made by the various States in such matters.

Numerous have been the classifications upheld by this court, but we shall confine this discussion to the citation

of a few most nearly similar to, and that appear plainly to sustain the classification being reviewed by this court in the case at bar.

In *Pembina Consolidated S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181, it was determined that foreign and domestic corporations may be separately classified.

It is no denial of equal protection for a State to impose a different rate upon one of its own corporations than that imposed on foreign corporations, for the privilege of doing business within its borders. *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 247 U. S. 132, 137; *Kansas City M. & B. R. Co.* v. *Stiles*, 242 U. S. 111, 118.

In *Pacific Express Company* v. *James M. Seibert*, 142 U. S. 339, 35 L. ed. 1035, this court held that the Missouri act imposing a tax upon the business of express companies was not repugnant to the 14th Amendment to the Constitution, because it did not impose a like tax upon railroad and steamship companies which carry express matters.

The equal protection of the law is not denied to a foreign corporation which manufactures goods in other States and sends them into this State for sale, by a tax on the amount of capital employed by it within the State, because of an exemption of corporations which are wholly engaged in manufacturing within the State. *N. Y.* v. *Roberts*, 171 U. S. 658.

In *McLean* v. *Arkansas*, 211 U. S. 539, this court held that the exemption of coal miines not employing ten or more men from the operation of an act of the State of Arkansas with reference to the wages of miners, did not render such statute invalid under the 14th Amendment to the Federal Constitution, as denying the equal protection of the laws.

This court has also upheld a distinction made in the

taxing system of a State between tracts of a 1000 acres or less and tracts of more than 1,000 acres. *King* v. *Mullins*, 171 U. S. 404.

In the case of *Middleton* v. *Texas P. & L. Co.* 249 U. S. 152, the exclusion of employees, where there were less than five under a single employer, from the operation of the Texas Workmen's Compensation Act was held not such an arbitrary classification as to deny the equal protection of the laws to an employee not in exempted class.

In *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, the exemption from taxation of legacies of less than a certain amount was held not to deny equal protection of the laws given by the 14th Amendment to the Federal Constitution.

In the case of *Citizens Telephone Company* v. *Fuller*, 229 U. S. 322, this court held that exempting the property of telephone companies whose gross receipts for the year did not exceed $500.00, from the ad valorem tax placed on telephone companies, did not render the statute invalid under the 14th Amendment to the United States Constitution as denying the equal protection of the laws.

In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 247 U. S., 132, it was held that it is not an arbitrary discrimination against life insurance corporations, amounting to a denial of the equal protection of the laws, for a State to tax them by taking a percentage of their gross receipts, while exacting a fixed and comparatively slight fee from similar foreign corporations for the privilege of doing local business of the same kind.

These cases and many others sustaining similar classifications are, we submit, full authority to sustain the classification now before this court. The exemption from an income tax on the intangible property owned by domestic corporations doing no business in Virginia is "not obvious-

ly exercised in a spirit of prejudice and favoritism." *Citizens Telephone Company* v. *Fuller*, 299 U. S. 322, 331. It is reasonable that corporations that do no business in Virginia, and do not enjoy the benefits derived from the revenue of the State should not be required to pay taxes to this State. Those corporations doing no business in Virginia occupy a relation to the State which is different from that of corporations doing business in the State. The latter have within the borders and jurisdiction of the State a large amount of property receiving protection and subject to taxation, while the former have no property in Virginia, operate no business here, and the State is not called on to afford it protection. The only connection they have with the State is the fact that they are granted authority through their charter to carry on business as a corporation, and they pay to the State, for this authority, the usual franchise and registration tax. The difference between these two classes of corporations is very similar to the difference upon which the classification was sustained the case of *Northwestern Mutual Life Insurance Co.* v. *State*, (Wis.) 247 U. S., 132, 137.

Corporations doing no business in Virginia are exempted from the payment of an income tax on their intangibles, "but this was doubtless for reasons that the Legislature deemed sufficient." The classification cannot be said to be purely arbitrary. "There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds." *Middleton* v. *Texas P. & L. Co.*, 249 U. S. 152, 157. Because one entertains the view that the act in question might as well have been extended so as to include the plaintiff in error in the exemption provided therein, or that the act should not have

exempted any corporations from the income tax, this would not amount to a constitutional objection. *Middleton* v. *Texas P. & L. Co.*, 249 U. S. 152, 157. "The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of discrimination to sustain a classification that may be subjected to criticism." *Middleton* v. *Texas P. & L. Co.*, 249 U. S., 152, 157.

As said in *Keeney* v. *New York*, 222 U. S. 525-536, a difference may not be great or conspicious in order to warrant a classification. The difference between the plaintiff, which carries on its business in Virginia, has its principal office in this State, and conducts all of its business entirely from this State, through its plant located here, and plants located in other States, and a corporation which has no principal place of business here, and does no business at all in the State, is sufficient to justify the State in exempting the latter corporation from a tax upon its intangibles. The distinction between a corporation having its principle office in Virginia and doing business in Virginia, and a corporation doing no business at all in this State would appear so obvious as to require only a mere statement of the two cases to sustain the distinction.

In *Citizens Telephone Company* v. *Fuller*, 229 U. S., 322, this court sustained the validity of an act of the Legislature of the State of Michigan, which assessed telephone companies on an ad valorem basis, but exempted the property of telephone and telegraph companies whose gross receipts within the State for a single year did not exceed $500.00. The court said that the exemption was within the rule that differences upon which classifications should be based need not be great or conspicuous. If the Legislature has the power to so classify as to exempt property of companies whose gross receipts do not exceed $500.00, then a

fortiori the Legislature has the power to so classify as to exempt corporations who do no part of their business in Virginia.

The cases already cited herein recognize that the State is competent to make discrimination in the matter of taxation. The 14th Amendment does not deprive the State of the power to select the subjects of taxation *Keeney* v. *New York*, 222 U. S. 525, 536. The only limitation is that there must not be clear and hostile discrimination against particular persons and classes. *Bell's Gap R. Co.* v. *Commonwealth*, 134 U. S., 232, 237, and other cases cited above. There is, in the exemption in question here, no clear and hostile discrimination against the plaintiff or the class to which it belongs. Therefore, the discrimination does not deny it equal protection of the laws.

Counsel for the plaintiff evidently recognized that there is a clear distinction for the purpose of taxation between corporations doing business in Virginia, and corporations doing no business in Virginia, and that there is not a hostile discrimination against the plaintiff in exempting corporations doing no business in Virginia from an income tax when he admits that it is valid for the State to assess the plaintiff on the entire income derived from the plant which it has in this State, while exempting from taxation the income of corporations doing no business in the State. If it is valid for the State to tax a part of the income of the plaintiff, a domestic corporation, while a corporation which does no business in Virginia is exempted from taxation on its income derived from intangibles, then it is manifestly valid to tax the *entire net income* of the plaintiff, though the net income of a corporation doing no business in Virginia is exempted from taxation on its intangibles. If the State has a right to tax the income of the plaintiff at all, it has the right to tax its entire income.

The plaintiff is a domestic corporation, its income is taxable in Virginia, and we know of no law which compels the State to tax only a part of the income of its citizens. The right to tax the income of the plaintiff carries with it the right to tax its whole income.

Moreover, the plaintiff is in an entirely different class from those corporations that do no business in Virginia. The act in question makes no discrimination of one against another in *the same class. This is all that is necessary. Michigan C. R. Co.* v. *Powers,* 201 U. S. 245, 293.

In *Pembina Con. Silver Mining etc., Co.* v. *Pennsylvania,* 125 U. S., 181, the court said:

> "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discrimination and hostile legislation."

Applying this rule, all corporations in the same class with the plaintiff; that is to say, all corporations that do any business in Virginia, are taxed on their income just as is the plaintiff. No one of this class has any exemption that the plaintiff does not enjoy. If the plaintiff ceases to do business in Virginia, immediately it becomes exempted from an income tax on its intangibles, it immediately enjoys the exemption extended to other domestic corporations that do no business in Virginia. On the other hand, as soon as a corporation, exempted under Chapter 495 of the Virginia Tax Statute under review, begins to do business in Virginia, its net income, *ipso facto,* becomes taxable in this State just as the income of the plaintiff is taxed. There is no discrimination against any one of the same class. All

corporations of the same kind are subjected to the same tax. There is no discrimination of one against another of the same class. Therefore, the equal protection of the laws is not denied. *Pacific Express Co.* v. *Siebert*, 142 U. S. 339; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606, 607.

We, therefore, submit that, by the exemption contained in Chapter 495 of the Acts of Assembly of Virginia 1916, now under review, the plaintiff is not denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution, when it is required to pay a tax on its net income, and this assignment of error is without merit.

II.

THE TAX IN QUESTION DOES NOT TAKE THE PLAINTIFF'S PROPERTY WITHOUT DUE PROCESS OF LAW.

The plaintiff contends that the imposition of a tax on the net income derived from profits earned by plants of the plaintiff located beyond the limits of Virginia, and doing business outside of Virginia, is unconstitutional, because it takes its property without due process of law. This contention constitutes the second assignment of error.

Counsel for the plaintiff should elect whether he will rely upon the first or second assignment of error, for the two are manifestly inconsistent. If, to tax the plaintiff on the net income derived from its plants located outside of Virginia, takes its property without due process of law, then the plaintiff is not deprived of the equal protection of the law when the State expressly exempts from taxation the net income of domestic corporations doing no business in

Virginia, for the State grants such corporations no exemption to which they do not already have a right, and no exemption that the plaintiff may not demand.

But that aside, the plaintiff is not deprived of its property without due process of law. Brief of counsel for the plaintiff devotes little space to a discussion of this assignment, and does not point to any authority sustaining his contention. One is, therefore, led to the conclusion that he does not seriously rely upon this assignment of error. With the exception of a reference to an authority which will hereinafter be referred to, counsel for the plaintiff, to sustain the assignment of error, simply calls attention to the fact that the source of the net income so far as the plants of the plaintiff located outside of the State are concerned, is beyond the jurisdiction of the Commonwealth. We admit this, but this fact does not cause the tax in question to take the plaintiff's property without due process of law, nor is there any conflict with the principle of taxation that a State, as a general rule, has no right to tax the property of its citizens permanently located in another jurisdiction. The income tax in question is not a tax on the property, or even the business of the plaintiff, located beyond the jurisdiction of the Commonwealth, but upon the acquisitions arising from that property. It is a tax on the net profits accruing from the property, and not only accruing from the property, but also accruing from the business located outside of the State.

As said by Warner, C. J., in delivering the opinion of the court in *Warren* v. *The Mayor*, 60 Ga. 93, 100:

> "* * * The fact is, property is a tree; income is the fruit; labor is a tree, income the fruit; capital the tree, income the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the

> seed which it encloses and will produce other trees and grow into more property; but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit."

In *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 415, this court said that income may be defined as the gain derived from capital or labor, or both combined, and this definition was approved in *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 185.

The income tax is not a tax on real estate, nor is it a tax on tangible property, or intangible property, or on capital, or on business, but it is a tax on the fruits of all these various properties. It is, in fact, "an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment." It is simply a method of distributing the burdens of the government according to the citizen's ability to pay, and that ability is determined by his entire income, regardless of its source or the location of the property or business from whence it comes. Such a tax "is but a method of distributing the costs of government, like a tax upon property." *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 319, 329.

That the income of a person is taxable at his domicile, so far as we know, has never been disputed, and counsel for the plaintiff admits it in claiming that it was proper for the State of Virginia to tax the net income of the plaintiff arising from the earnings of the business done both in and outside of Virginia by its plants located in Virginia (R., p. 24). But he contends that the tax must be confined to the net income so derived; that to tax the entire income of the plaintiff violates the Federal Constitution. We have been unable to discover any case, and the brief of counsel

for the plaintiff has cited no case which sustains this position. The authorities give no consideration to the source of the income in fixing its situs for taxation. Its source, or the location of the property or business from which the net income arises is not an element entering in the determination of its situs for taxation. The whole question is the domicile of the person receiving the income. When that is established, it draws to it jurisdiction to tax all the income from whatever source derived.

The jurisdiction to tax the income is not dependent upon the location of the property or business from which it is derived. *Hawley* v. *Malden*, 232 U. S. 1, 11. In this case, the court called attention to the fact that the doctrine that a State has no right to tax the property of its citizens when it is permanently located in another jurisdiction does not apply to the taxation of intangible personal property. For more cogent reasons, this doctrine does not apply to the tax on the net income of its citizens derived from property or business in another jurisdiction.

The net income in question in the case at bar comes to the principal office of the plaintiff, at least is controlled by the plaintiff at its principal office in Virginia. The plaintiff, a Virginia corporation, has full control over its distribution or investment. It is intangible in its nature, and it is because of its nature that it has been uniformly recognized that the State, having jurisdiction of the person receiving the income, has the right to tax the income regardless of the source from which it is derived. The location of the property or business producing the net income does not enter into a determination of its situs for taxation, and the fact that the net income is derived from property or business beyond its jurisdiction does not deter a State from taxing such net income.

The plaintiff is a Virginia corporation, and, like any citizen of Virginia, its net income is taxable at its domicile, Virginia, regardless of the source from which it is derived.

This has been recognized by Congress in the enactment of the Federal Income Tax Laws. The Federal Income Tax Law of 1916 provides that there shall be levied, assessed, collected and paid annually a tax upon the net income received in the preceding calendar year from *all sources* by every individual or citizen in the United States, and by every corporation organized in the United States. Statutes at Large of U. S., vol. 39, part I, p. 756. This statute defines net income as gains and profits *derived from any source whatsoever.*

So the Revenue Act of 1918, approved February 24, 1919 (United States Statutes at Large(1918, 1919, pp. 1057, 1065) assesses the net income *from any source whatsoever.*

The Federal Income Tax Law of 1894 (Acts of Congress, August 27, 1894, 28 Stat. 509, C. 349) assesses every citizen of the United States, or corporation organized in the United States upon the gains, profits or income *derived from any property or business carried on in the United States or elsewhere, or from any other source whatsoever.*

The Act of October 3, 1913, Chapter 16, §11, 38 Stat. at L. 166, 172, also provides for the payment by every corporation of a tax on the "entire net income arising or accruing from all sources in the preceding calendar year."

This court has interpreted the expression "entire net income arising from all sources," used in the statutes above cited, to include income wherever earned. In *Peck & Co.* v. *Lowe*, 247 U. S. 165, this court held that the income of a domestic corporation derived from the business of shipping goods to foreign countries and there selling them, is com-

prehended by the provisions of the act of October 3, 1913, subjecting every corporation to the payment of a tax of a specified per cent. of its "entire net income arising or accrued from all sources during the preceding calendar year."

Under these statutes, therefore, where a domestic corporation has established branch offices or agencies for the transaction of its business in foreign countries, *the profits accruing at such branches or agencies are a part of the income of the corporation, and are assessable in the United States, its domicile.* Black on Income Taxation, §60.

The right of the State to tax the intangible interest of one of its citizens beyond its jurisdiction, and even to tax persons beyond its jurisdiction having intangible interests in property within its jurisdiction has been recognized by this court.

In *Corry* v. *Baltimore*, 196 U. S. 466, this court recognizes the right of the State of Maryland to tax a non-resident on the shares of stock he owned in a Maryland corporation. The statute under review in that case declared that, for the purpose of taxation, the situs of stock in Maryland corporations owned by non-residents should be at the principal office of the corporation in Maryland, and such shares were there assessed at their value to the owner. The statute further imposed upon the Maryland corporation the duty of paying for and on account of the owner the taxes assessed in respect of the shares, and gave to the corporation paying the tax a right to proceed by *personal* action against the stockholder to recover the amount paid.

The plaintiff in error in that case, a resident of Pennsylvania, acquired certain shares of stock in a Maryland corporation which was assessed for State taxes, and in conformity with the State law, payment was demanded of the corporation. The plaintiff in error then brought a suit to restrain the collection of the tax on the ground that the law

of Maryland under which the tax was levied was repugnant to the Federal Constitution. He claimed that, "as the authority of the State of Maryland to tax is limited by the effect of the Fourteenth Amendment to the Constitution of the United States to persons and property within the jurisdiction of the State, and as the tax in question was not *in rem* against the stock, but was *in personam* against the owner, the power attempted to be exercised as it imposed a personal liability was wanting in due process of law." Otherwise expressed by Mr. Justice White, who delivered the opinion of the court (p. 475), the argument was "that as the situs of the stock within the State was the sole source of the jurisdiction of the State to tax, the taxation must be confined to an assessment *in rem* against the stock, with a remedy for enforcement confined to the sale of the thing taxed, and hence without the right to compel the corporation to pay or to give it, when it did pay, a personal action against the owner."

The court said (p. 476):

> "* * * The principle upheld by the rulings of this court to which we have referred, concerning the taxation by the States of stock in national banks, is that the sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein, and that a regulation establishing the situs of stock for the purpose of taxation and compelling the corporation to pay the tax on behalf of the shareholder, is not unreasonable regulation. Applying this principle, it follows that a regulation of that character, prescribed by a State, in creating a corporation is not an exercise of the taxing power of the State over persons

> and things not subject to its jurisdiction. And we think, moreover, that the authority so possessed by the State carries with it the power to endow the corporation with a right of recovery against the stockholder for the tax which it may have paid on his behalf. Certainly, the exercise of such a power is no broader than the well-recognized right of a State to affix to the holding of stock in a domestic corporation a liability on a non-resident as well as a resident stockholder *in personam* in favor of the ordinary creditors of the corporation. *Flash* v. *Conn.*, 109 U. S. 371; *Whitman* v. *Oxford National Bank*, 176 U. S. 559; *Nashua Savings Bank* v. *Angelo-American L. M. & A. Co.*, 189 U. S. 221, 230, and cases cited; *Platt* v. *Wilmot*, 193 U. S. 602, 612."

This court concluded (p. 479) "that the legislation of the State of Maryland in question did not contravene the due process clause of the Fourteenth Amendment to the Constitution of the United States."

So, the State of Virginia which created the plaintiff, had a right to impose reasonable regulations concerning the taxation of that corporation, and the taxation of the net income derived from all sources by its operations is not an unreasonable regulation. It follows that the taxation of all the net income of the plaintiff by Virginia, the State creating it and in which it has its domicile, is not an exercise of the taxing power of the State over property not subject to its jurisdiction, especially when we consider the nature of income.

Upon the same principle, this court has sustained the taxation by a State of stock owned by one of its citizens in a foreign corporation, which had no property and did no bus-

iness in such State. In the case of *Hawley* v. *Malden*, 232 U. S. 1, the State of Massachusetts taxed the shares of stock owned by a resident of Massachusetts, in a foreign corporation which did no business and had no property within the State of Massachusetts. He alleged that the levy was in violation of the due process clause of the Fourteenth Amendment, and contended that the shares were not within the jurisdiction of the State, and hence that the enforcement of the tax constituted an unconstitutional deprivation of property. This court, in sustaining the tax as not violative of the due process clause of the Federal Constitution, said that it was dealing with intangible interests of the shareholder and that, therefore, there was manifestly no question of physical situs so far as the distinct property right was concerned, and the jurisdiction to tax was not dependent upon the location of the lands and chattels of the corporation; that the shares were in the nature of choses in action, and as such they were appropriately related to the person of the owner and being held by him at his domicile constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys.

In the first of these cases, the State had no jurisdiction over the taxpayer personally taxed, but did have jurisdiction over the shares of stock, and this court sustained the validity of the tax. In the second case, the State had no jurisdiction over the property in which the taxpayer had rights through his shares of stock, but it did have jurisdiction over the taxpayer, and because of this fact the court sustained the validity of the tax. It is true that these cases were dealing with shares of stock, but the same principles which caused the court to pronounce the statutes in these

cases valid sustain the validity of the statute now before this court as not violative of the due process clause of the Federal Constitution.

As the due process clause of the Federal Constitution is not violated when a State taxes a non-resident on stock owned in a domestic corporation, and as the due process clause is not violated when a State taxes the stock owned by one of its citizens in a corporation that has no property and does no business in that State, so Virginia does not offend the same due process clause when it taxes a corporation created by it upon its net income derived from business carried on by it, and the property owned by it located outside of the State.

In the last case, the conclusion of the court, as we have shown, was based upon the fact that a shareholder's receipts are in the nature of choses in action, and as such they are appropriately related to the person of the owner, and being held by him at his domicile constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. So, in respect to the net income, *from whatever source it is derived, whether in this State or outside of this State,* it is appropriately related to the person of the owner, and, coming eventually to his domicile and being controlled by him at his domicile, he is under obligations with respect to it, to contribute to the government whose protection he enjoys. In this same case the court calls attention to the fact that the doctrine that a State has no right to tax the property of a citizen where it is permanently located in another jurisdiction does not apply to the taxation of intangible personal property. Much more does it not apply to the tax on net income derived from property in another jurisdiction.

Again, the court says (p. 11):

> "* * * When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation."

This statement applies as fully to a tax on net income which is intangible in its character. In such case, there is no question of physical situs so far as this distinct right is concerned, and the jurisdiction to tax is not dependent, therefore, upon the location of the property or business from whence the net income is derived. If he who receives and controls the net income is within the jurisdiction of the State, then the State has all jurisdiction necessary to tax the net income regardless of the location of the property or business yielding it.

Again, this court, in *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 329, said that a tax upon the net profits *from whatever source arising* was but a method of distributing the costs of government, and, therefore, did not contravene the commerce clause of the United States, even though it included the net income derived from transaction of interstate commerce. For the same reasons, a statute taxing the net income of a domestic corporation, even though it includes the net income derived from business and property entirely beyond the jurisdiction of the State, does not deprive that corporation of its property without due process of law.

Counsel for the plaintiff refers to the case of *American Mfg. Co.* v. *St. Louis*, decided by this court June 9, 1919,

and reported in U. S. Avd. Ops. June 15, 1919, p. 656. In that case, this court had before it an ordinance of the city of St. Louis, Missouri, levying against the American Mfg. Co., a foreign corporation, and the plaintiff in error in the case, a license tax imposed as a condition to carrying on a manufacturing business in that city, the amount of tax being ascertained by and proportioned to the amount of sales of the manufactured goods whether sold within or without the State, and whether in domestic or interstate commerce. The plaintiff in error contended that so much of the tax as was measured by the sale of goods manufactured by the plaintiff in the city and afterwards removed to its warehouses outside of the State and later sold from these warehouses to purchasers in other States denied it due process of law. But this court overruled the contention, and sustained the tax.

Counsel for the plaintiff says (plaintiff's brief, p. 17):

> "* * * the practical operation and effect of this decision is to give the State in which a plant is located the right to tax net incomes derived from the sale of goods manufactured in the local factory, and therefore the situs for taxation of net incomes is in the State where the goods are produced from which the net income is derived."

Neither the premise nor the conclusion reached by counsel for the plaintiff is sound. This court, in sustaining the tax, said that the operation and effect of the ordinance was to impose a legitimate burden on the manufacture of goods in the city, and had only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other, a general contribution to the

costs of the government; therefore, it did not have the effect of imposing a tax upon the property or business transaction of the plaintiff outside of the State, and hence did not deprive him of his property without due process of law. For the same reasons, the net income here in question does not have the effect of depriving the plaintiff of his property without due process of law. This court made no intimation, in that case, that weakens, in the least the position we have taken herein.

Furthermore, the issue raised here was not, in any manner, before the court in that case. That case was dealing entirely with a license tax on business, and had no reference to an income tax. A license tax is a tax for the privilege of doing business, and the situs of such tax is the place of such business. On the other hand, an income tax *is not a tax on property or business, nor on the privilege of doing business;* but, as we have hereinbefore demonstrated, *it is a personal tax upon the net earnings derived from both property and business,* and the situs for such taxation is the domicile of the person receiving it. It is apparent that a license tax and an income tax are entirely distinct and separate in their natures.

The conclusion reached by counsel for the plaintiff takes for granted the very issue involved in this case. In addition, the right of the State in which the goods are produced to tax the net income derived therefrom is not an issue here, nor is there anything in the record to show that the plaintiff is assessed with or pays an income tax in any State outside of Virginia. Moreover, if our position is correct, and we earnestly submit it is, Virginia has a right to tax the net income of the plaintiff derived from all sources, and the

fact that some other State could tax a portion of that income if, in the future, it sees fit so to do, does not render the Virginia tax invalid.

We submit, therefore, that this assignment of error is without merit.

III.

THE STATUTE IN QUESTION IMPOSES NO UNLAWFUL BURDEN ON INTERSTATE COMMERCE.

The third assignment of error contends that the tax upon the *net income* derived by the plaintiff from its plants located and doing business outside of Virginia contravenes the commerce clause of the Constitution of the United States.

In this connection, we again call attention to the inconsistency of the position of counsel for the plaintiff. He recognizes both in the agreed statements of facts (R., p. 24) and in his brief (p. 18) the right of the State of Virginia to tax the *net income* derived from the sale of the products of the plaintiff manufactured at its Virginia factory and sold outside of the State of Virginia in interstate commerce. He admits that a tax by Virginia upon the *net income* derived from the sale, in interstate commerce, of its products manufactured in Virginia does not impose an unlawful burden on interstate commerce, and yet he claims that a tax by Virginia upon the *net income* derived from the sale of the plaintiff's products manufactured at its plants located outside of Virginia and sold outside of Virginia is an unlawful burden on interstate commerce. Whether or not an income tax burdens interstate commerce is not determined by the location of the property which produces such income, nor the place where the sales are made which

produce the income. It is determined by the character of the burden that is whether direct or indirect. As a tax on the *net income* derived from the sale of products of the Virginia plants outside of the State of Virginia, that is in interstate commerce, does not directly burden interstate commerce, it is obvious that a tax on the *net income* derived from the sale of products manufactured outside of Virginia and sold in interstate commerce does not so burden interstate commerce.

The validity of a tax on *net income* has been sustained so fully by this court that the writer hereof thought its validity would not be again questioned, at least, on the ground that it places a direct burden on interstate commerce. We shall, therefore, confine our discussion to a reference to two cases in which this court recognized the validity of such a tax.

In *Peck & Co.* v. *Lowe*, 247 U. S. 165, this court held that a tax on the *net income* of a domestic corporation derived from the business of shipping goods to a foreign country and there selling them is not forbidden by the Federal Constitution, Article I, section 9, providing that "no tax or duty shall be laid on articles exported from any State." In delivering the opinion of the court, Mr. Justice Van Devanter said (p. 174):

> "* * * It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see *Stanton* v. *Baltic Mining Co.*, *supra*, p. 113), it is both nominally and actually

a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed; that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

"For these reasons we hold that the objection urged against the tax is not well grounded."

Mutatis mutandis, this language could be used with equal force with reference to the tax under discussion.

The exact contention urged in the case at bar is settled by the case of *United States Glue Company* v. *Oak Creek*, 247 U. S. 321. In that case, the question before the court, as stated by Mr. Justice Pitney, who delivered its opinion, was (p. 326) "whether a State, in levying a general income tax

upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States." *Precisely the same question is again brought before the court by this assignment of error.*

This court, after stating that a State may not directly burden interstate commerce either by taxation or otherwise, said that a *tax that only indirectly affects the profits or returns from such commerce is not within the rules.* The court makes reference to cases illustrating the distinction between direct and indirect burdens, especially with reference to a comparison between a tax on the gross returns of corporations in interstate commerce, and a general income tax imposed upon all inhabitants, incidentally affecting corporations engaged in such commerce. It then continues (p. 328):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably, it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above ex-

penses and losses, and the tax cannot be heavy unless the profits are large. *Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there* be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." (Italics supplied.)

We submit that this is a complete answer to the contention that the income tax now before this court violates the commerce clause of he Federal Constitution.

The tax complained of is measured, not by the gross receipts, but by the *net* profits from the plaintiff's interstate business, along with a like imposition upon its income derived from other sources and in the same manner that other corporations and individuals doing business in the States are taxed upon that proportion of their income derived from business transacted and property located within the State, whatever the nature of their business. In other words, the plaintiff is a Virginia corporation, and is taxed on *net* income, just as citizens of Virginia are taxed, whose business is transacted and properly located entirely within the State. There is no discrimination against interstate commerce, either in admeasurement of the tax or in the means adopted for enforcing it, and the plaintiff does not so contend. It is clear that the tax in question in the case at bar is not "so

direct a burden upon interstate commerce as to amount to an unconstitutional interference with, or regulation of, commerce among the States."

Counsel for the plaintiff, referring to the Glue Company case, says that "a distinction was made in the lower court between net income derived from the sale of goods manufactured in local factories and net income derived from the sale of goods manufactured in extra State factories and sold without the State." There was no such distinction made by the lower court or this court, but the statute there considered provided—and this court called attention to the fact—that:

> "Any person engaged in business within and without the State shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, pay taxes only upon that proportion of such income as is derived from business transacted and property located within the State."

Therefore, the lower court naturally held that because of this provision, income derived from goods shipped from the plaintiff's branches without the State was not taxable.

This court, in its decision, did not take into consideration whether the income came from earnings of the plants located in the State or outside of the State, nor was there any intimation by this court that the statute would have contravened the commerce clause if it had not contained the provision above quoted.

That this is true clearly appears from the quotation above, setting out the question considered by the court, and further appears from the quotation above, showing the dif-

ference in effect between a tax measured by gross receipts and one measured by net income. It will be noted in the last quotation above that this court expressly said that a tax imposed upon net income from *whatever source arising* was not forbidden by the commerce clause. The decision rested entirely on the ground that a tax on the net income from interstate commerce is not a direct burden on such commerce, but a charge that is only indirect and incidental, and, therefore, does not contravene the commerce clause of the Federal Constitution. The fact that the income taxed is derived from plants located outside of the State does not affect this rule.

The tax on the net income of the plaintiff derived from the net earnings of its plant outside of the State does not, therefore, impose any unlawful burden on interstate commerce, and there is no merit in this assignment of error.

For these reasons, we submit that the judgment of the Supreme Court of Appeals of Virginia is correct, and should be affirmed.

Respectfully submitted,

JNO. R. SAUNDERS,
Attorney General.
J. D. HANK, JR.,
Assistant Attorney General.

ADDENDUM.

Since the above brief of argument was printed, our attention has been called to the decisions of this court in the case of *Schaffer* v. *Carter, State Auditor, et als*, and in the

case of *Travis, Comptroller* v. *Yale and Town Manufacturing Co.*, in which cases opinions were handed down on March 1, 1920.

In these cases, income tax statutes were before this court, and we submit that the principles upon which this court sustained the Oklahoma statute are equally applicable to the Virginia statute now before this court. It is true that the Oklahoma case involved the right of the State to tax income accruing to a non-resident from property in the State, but the statute under review in that case taxed the income of citizens and residents of the State derived from property *located out of the State*. In the Oklahoma case and also in the case of *Travis, Comptroller* v. *Yale and Town Manufacturing Co., this court recognized the right of the State to tax the income derived by its citizens from property and business located outside of the State as well as in the State.*

So far as the question of interstate commerce raised in the case at bar is concerned, in *Schaffer* v. *Carter, State Auditor, et als.*, this court said that an income tax upon the net proceeds is plainly sustainable even if it includes net gains from interstate commerce; this is a complete answer to the third assignment of error in the case at bar.

Respectfully submitted,

JNO. R. SAUNDERS,
Attorney General.
J. D. HANK, JR.,
Assistant Attorney General.

F. S. ROYSTER GUANO COMPANY *v.* COMMONWEALTH OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 165. Argued March 19, 22, 1920.—Decided June 7, 1920.

A state law which taxes all the income of local corporations derived from business done outside of the State and business done within it, while exempting entirely the income derived from outside the State by local corporations which do no local business, is arbitrary and violates the equal protection clause of the Fourteenth Amendment. P. 415.

Reversed.

THE case is stated in the opinion.

Mr. Cadwallader J. Collins for plaintiff in error.

Mr. J. D. Hank, Jr., Assistant Attorney General of the Commonwealth of Virginia, with whom *Mr. Jno. R. Saunders*, Attorney General of the Commonwealth of Virginia, was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error is a corporation created by and existing under the laws of Virginia, engaged in the business of manufacturing and selling commercial fertilizers. It operates a manufacturing plant in the County of Norfolk in that State and several plants in other States. From the operation of its plant in Virginia it made net profits during the year ending December 31, 1916, amounting in round figures to $260,000; and from the operation of its plants in other States during the same year made net profits amounting to about $270,000. Under the revenue law of

the State (Act of April 16, 1903, Va Acts, c. 148, p. 155, as amended by Act of March 22, 1916, Va. Acts, c. 472, p. 793), plaintiff in error returned for taxation as income the former amount, omitting the latter. Under appropriate provisions of law the state officials added the latter amount, and assessed an income tax against plaintiff in error upon the aggregate. It petitioned the Corporation Court of the City of Norfolk for relief from so much of the tax as represented the $270,000, among other reasons upon the ground that, so far as c. 472 of 1916 taxed that part of its business which was transacted outside of the limits of Virginia, the law imposed upon plaintiff in error a burden not placed upon domestic corporations doing no part of their business in Virginia but transacting business beyond the limits thereof, such corporations, by c. 495 of 1916 (Va. Acts, p. 830), being expressly exempted from a tax on income derived from business done without the limits of the State; and hence c. 472, as applied to the business of plaintiff in error transacted beyond the limits of the State, denied to it the equal protection of the laws, in violation of the Fourteenth Amendment. Other points were raised, but they require no mention. The Corporation Court having sustained the tax, plaintiff in error applied to the Supreme Court of Appeals of the State for a writ of error and supersedeas to review the judgment. That court being of opinion that the decision was right, the application was denied and an order entered in effect affirming the judgment of the Corporation Court; whereupon this writ of error, directed to the Supreme Court of Appeals in accordance with the practice indicated in *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S. 264, 269, was sued out under § 237, Judicial Code, as amended September 6, 1916, c. 448, 39 Stat. 726.

The statute thus assailed (Va. Acts 1916, c. 472) imposes an income tax of 1 per centum upon "the aggregate amount of income of each person or corporation," subject

to specified deductions and exemptions; including in income "all profits from earnings of any partnership or business done in or out of Virginia," and also "all other gains and profits derived from any source whatever." Under this act, as applied to plaintiff in error by the state officers, whose action was sustained by the court of last resort, a tax was imposed upon the income derived from its plants without the State as well as from that within the State. At the same time, c. 495, Laws 1916 (p. 830), approved on the same day, was in force. This reads as follows: "Whereas, certain corporations have been organized under the laws of Virginia, and it is anticipated that certain others will be organized thereunder, which do no business within this State; therefore—1. Be it enacted by the general assembly of Virginia, That no income tax nor ad valorem taxes, State or local, shall be imposed upon the stocks, bonds, investments, capital or other intangible property owned by corporations organized under the laws of this State which do no part of their business within this State; and the mere holding of stockholders meetings in this State by such corporations required by law, shall not be construed as doing any business in this State within the meaning of this act; " with further matter not necessary to be quoted. It is not disputed that, under this act, corporations created by and existing under the laws of Virginia, and doing business in other States but none within the State except the holding of stockholders' meetings, are exempted from the payment of any income tax.

Of course, these two statutes—c. 472 and c. 495—must be considered together as parts of one and the same law; and by their combined effect, if the judgment under review be affirmed, plaintiff in error will be required to pay a tax upon its income derived from business done without as well as from that done within the State, while other corporations owing existence to the same laws and simul-

taneously deriving income from business done without the State but none from business within it, are exempt from taxation.

It is unnecessary to say that the "equal protection of the laws" required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Michigan Central R. R. Co.* v. *Powers,* 201 U. S. 245, 293; *Keeney* v. *New York,* 222 U. S. 525, 536; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 329; *Northwestern Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, 139. Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of c. 495 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the State except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the State warranting the imposition of taxes upon their incomes derived from without the State or property taxes upon their intangibles, and in recognition of the impolicy if not injustice of imposing such taxes upon them while they are liable, and presum-

ably subjected, to taxation in the State or States where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the State where they also transact income-producing business within the State. Corporations of this class derive no more protection from the State of their origin with respect to their outside business, and are no less subject to taxation by the States in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the State of origin. Their business done within the State presumably is of some general benefit to the State, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under c. 472 of taxes not only upon this income but also upon income that they derive from business conducted outside of the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that which ought to operate if at all in their favor. It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design.

We suggest that it was inadvertent because shortly after the present suit was brought, and as if in recognition of and in order to correct the discrimination, the revenue act was amended by Act of March 14, 1918 (c. 219, Va. Acts, p. 395), providing: "Persons and corporations

doing a part of their business within the State and a part without the State, and having offices or other regular places of business both within and without the State, shall be taxed only upon such income as is derived from business transacted and property located within the State, which may be determined by an allocation and separate accounting," etc. But this was not retrospective, and, for the reasons given, we are constrained to hold that so far as c. 472 of the Laws of 1916 operated to impose upon plaintiff in error a tax upon income derived from business transacted and property located without the State because of the mere circumstance that it also derived income from business transacted and property located within the State, while at the same time, under c. 495, other corporations deriving their existence and powers from the laws of the same State, and receiving income from business transacted and property located without the State but none from sources within the State, were exempted from income taxes, there was an arbitrary discrimination, amounting to a denial to plaintiff in error of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BRANDEIS dissenting, with whom MR. JUSTICE HOLMES concurs.

It is settled that mere inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment; that the power of the State to make any reasonable classification of property, occupations, persons or corporations for purposes of taxation is not abridged thereby; and that the Amendment forbids merely inequality which is the result of clearly arbitrary action and, particularly, of action

attributable to hostile discrimination against particular persons or classes. *Beers* v. *Glynn*, 211 U. S. 477, 485; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461, 463, 464; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237. The question presented for our decision is whether the action of Virginia in subjecting its domestic corporations which transact business within the State to a tax on all their income, wherever earned, while exempting from the tax those domestic corporations which transact no business within the State, is so clearly arbitrary or invidious, as to fall within the constitutional prohibition.

The court declares the act void on the ground that no substantial reason for difference in treatment between the two classes of domestic corporations has been suggested or can be conceived; and that the classification is illusory and the States' action arbitrary. I can conceive of a reason for differentiating in respect to taxation between the two classes of domestic corporations. The following reason is, in my opinion, substantial, and shows that the classification is not illusory, nor the State's action necessarily arbitrary or invidious.

It is a matter of common knowledge that some States have, in the past, made the granting of charters to non-residents for companies, which purpose transacting business wholly without the State of incorporation, an important source of revenue. The action of those States has materially affected the legislation of other States. Sometimes it has led to active competition for the large revenues believed to be available from this source. More often, it has led to protective measures. The legislature of Virginia may have believed that its own citizens interested in corporations whose business was transacted wholly in other States or countries, might be tempted to incorporate under more favorable laws of other States, but that such temptation would prove ineffective where the companies transacted a part of their business within

the State of Virginia and enjoyed compensating advantages. If the legislature of Virginia enacted the laws of 1916 here in question because it held that view, we surely cannot say that its action was unreasonable or arbitrary. And with the wisdom of its action we have no concern.

If there were a doubt as to its reasonableness the facts which were, or may have been, before the legislature should be considered. Every private domestic business corporation makes a substantial contribution to the revenues of Virginia even if it is not subjected to property or income taxes. It pays an organization tax on incorporation; and annually thereafter both a registration fee and an annual franchise tax. These fees and taxes are graduated. For a corporation with a $1,000,000 capital the organization fee is $200; the annual registration fee and franchise tax $225. Laws of 1903, c. 148, §§ 37, 43, 41, pp. 179, 182, 180; as amended respectively by Laws of 1912, c. 301; 1910, c. 58; 1908, c. 227. In the year 1915–1916 the fees and taxes from this source aggregated $114,-175.80.[1] The number of charters issued was 1067—many of them, as the list indicates, to companies whose business would be transacted wholly without the State of Virginia.[2] The dangers from competition incident to less burdensome corporation laws of other States had, in other connections, been considered by the Tax Commission.[3] It may well have been the case that the legislature did not wish to put in peril revenues already being received from concerns which, as they transacted no business within the State, might easily have surrendered their Virginia charters and reincorporated under the laws of the other States; and it would have been natural that

[1] Report of Auditor of Virginia (1916), p. 66; Report of State Corporation Commission of Virginia (1916), p. 270.

[2] Report of State Corporation Commission of Virginia (1916), pp. 226–248, 269.

[3] Report of Virginia Tax Commission (1911), p. 354.

to avert such loss the legislature should have relieved such corporations from the payment of income taxes. The Joint Committee on Tax Revision had recommended that the income tax cover "all profits from earnings of any partnership or business done in or out of Virginia," and had not suggested that domestic corporations should be exempted from it.[1] It was reasonable that other domestic corporations should have been subjected, like natural persons domiciled within the State to a tax on all income—whether earned within or without the State. Compare *Cream of Wheat Co.* v. *County of Grand Forks*, *ante*, 325.

The court calls attention to the Act of March 14, 1918 (c. 219, Va. Acts, p. 395), which exempts all individuals and corporations from the burden of taxation on incomes earned without the State. The effect of this act is, among other things, to remove the alleged discrimination here complained of. But its enactment does not, in my opinion, indicate that the imposition of the tax was inadvertent. To my mind it indicates rather that the legislatures of the several States may safely be entrusted with the duty of legislation.

I cannot doubt that the classification for purposes of taxation made by the Act of 1916 was within the power of the State. But if I did not think the matter clear, I should, for the reasons stated by me fully elsewhere, feel constrained to resolve the doubt in favor of the constitutionality of the act.

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[1] Report of Joint Committee on Tax Revision (Virginia, 1914) p. 203.